

NEW JERSEY REGISTER
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RULE ADOPTIONS

**COMMUNITY AFFAIRS
NEW JERSEY COUNCIL ON AFFORDABLE HOUSING**

40 N.J.R. 3161(a)

Adopted Amendment: N.J.A.C. 5:95-1.1

Adopted New Rules: N.J.A.C. 5:96

Procedural Rules of the New Jersey Council on Affordable Housing for the Period Beginning on December 20, 2004 and for the Period Beginning on June 2, 2008

Proposed: January 22, 2008 at 40 N.J.R. 515(a).

Adopted: May 6, 2008 by the New Jersey Council on Affordable Housing, Lucy Voorhoeve, Executive Director.

Filed: May 8, 2008 as R.2008 d.146, **with substantive and technical changes** not requiring additional public notice and comment **and with the proposed repeal of N.J.A.C. 5:95 not adopted.**

Authority: N.J.S.A. 52:27D-301 et seq.

Effective Date: June 2, 2008.

Expiration Date: December 20, 2009, N.J.A.C. 5:95;

June 2, 2013, N.J.A.C. 5:96.

The proposed rules were published in the New Jersey Register January 22, 2008. The 60-day comment period closed on March 22, 2008.

Summary of Hearing Officer Recommendations and Agency Responses:

In addition to accepting written public comments, the Council held five public hearings on January 24, 2008 at the Rutgers University Student Center, 326 Penn Street, Camden, New Jersey; January 28, 2008 at Lincoln Park Administration Building, Jersey City, New Jersey; January 30, 2008 at the Wayne Public Library, 461 Valley Road, Wayne, New Jersey; February 5, 2008 at the Hunterdon County Route 12 Complex, Flemington, New Jersey; and February 6, 2008 at the Monmouth County Library, 125 Symmes Drive, Manalapan, New Jersey. The hearing officers

for each of the public hearings were as follows: Lucy Voorhoeve, Camden; Joseph Doria, Jersey City, Wayne and Flemington; and Charles Richman, Manalapan. No recommendations were made by the hearing officers. The hearing transcripts are available at the Council's offices at 101 South Bend Street, 7th Floor, Trenton, New Jersey 08625.

Summary of Public Comment and Agency Response:

The Council received 80 sets of written comments and public statements from the following individuals or organizations:

1. Barra, Vince, Mayor, Allendale Borough, NJ
2. Bayer, Andrew, on behalf of the Borough of Tinton Falls, NJ
3. Bayer, Andrew, on behalf of Hillsborough Township, NJ
4. Bernard, Art, on behalf of the NJ Builders Association
5. Bieri, Bettina, Mayor, West Milford Township, NJ
6. Burgis, Joseph H., on behalf of Alpine Borough, NJ
7. Burgis, Joseph H., on behalf of the City of Garfield, NJ
8. Burgis, Joseph H., on behalf of the Borough of Teterboro, NJ
9. Burgis, Joseph H., on behalf of Atlantic Highlands Borough, NJ
10. Burgis, Joseph H., on behalf of the Borough of Oradell, NJ
11. Burgis, Joseph H., on behalf of the Borough of Hawthorne, NJ
12. Burgis, Joseph H., on behalf of Upper Saddle River Borough, NJ
13. Burgis, Joseph H., on behalf of Fairfield Township, NJ
14. Burgis, Joseph H., on behalf of Rockaway Township, NJ
15. Burgis, Joseph H., on behalf of Parsippany-Troy Hills Township, NJ
16. Burgis, Joseph H., on behalf of Westwood Borough, NJ
17. Burgis, Joseph H., on behalf of Mahwah Township, NJ
18. Burke, James, Deputy Mayor, Kingwood Township, NJ
19. Canuso, John B., Canuso Communities, Haddonfield, NJ
20. Chase, Theodore Jr., Franklin Township Planning Board, NJ
21. Corcoran, Steven, Township of Delanco, NJ
22. Cranbury Township Committee, NJ
23. Davison, Walter J., Mayor, Borough of Ringwood, NJ

24. Dempski, David, Mayor, Washington Township Committee (Warren County)
25. Dougherty, Linda, Township of Edgewater Park, NJ
26. East Brunswick Township, NJ
27. Fennessy, Conor, New Jersey Apartment Association, Trenton, NJ
28. Flannery, Patricia, Mayor, Bridgewater Township, NJ
29. Frasier, Morris, Community Access Unlimited
30. Fredon Township, NJ
31. Gottesman, Randall M., Affordable Housing Professionals of NJ
32. Graefe, John, Mayor, Township of Bethlehem, NJ
33. Grbelja, Nancy, Mayor, Township of Millstone, NJ
34. Hardyston Township, NJ
35. Hauck, Robert B., Mayor, Borough of Flemington, NJ
36. Healey, Mark A., Township of Franklin, NJ
37. Holtaway, Robert F., Mayor, Bedminster Township, NJ
38. Hornik, Jonathan L., Mayor, Township of Marlboro, NJ
39. Jacobson, Joel N., Chatham Township Planning Board, NJ
40. Kantowitz, Jeffrey, Goldberg, Mufson & Spar, West Orange, NJ
41. LaPaglia, Joseph T., Pascack Valley Mayors Association, Woodcliff Lake, NJ
42. Liggett, Larry, NJ Pinelands Commission, New Lisbon, NJ
43. Lonergan, Mary Beth, on behalf of Florence Township, NJ
44. McGroarty, Chuck, Banisch Associates, Inc., Flemington, NJ
45. McKenzie, Elizabeth C., on behalf of Wyckoff Township, NJ
46. McKenzie, Elizabeth C., on behalf of the Borough of Haddonfield, NJ
47. McKenzie, Elizabeth C., Elizabeth C. McKenzie, PP, PA, Flemington, NJ
48. Michaud, Roger, Mayor, Township of Green, NJ
49. Mullen, James P., Pulte Homes, Bernardsville, NJ
50. Papazian, Aram, Alexandria Township Planning Board, NJ
51. Phoebus, Gail, Mayor, Township of Andover, NJ

52. Readington Township Committee, NJ
53. Reiter, Caroline, on behalf of Hillsdale Borough, NJ
54. Russo, John F., Russo and Cassidy, LLC, Toms River, NJ
55. Rustin, Peter, Mayor, Borough of Tenafly, NJ
56. Scapicchio, David M., Mayor, Township of Mount Olive, NJ
57. Schoor, Barbara K., Community Investment Strategies, Inc., Bordentown, NJ
58. Shapella, Ron, Deputy Mayor, West Amwell Township, NJ
59. Simpkins, F. Lyman, Mayor, Pemberton Borough, NJ
60. Slaugh, Brian M., on behalf of Moorestown Township, NJ
61. Surenian, Jeffrey, Jeffrey R. Surenian and Associates, Brielle, NJ
62. Tarshis, Steven M., Mayor, Township of Franklin, NJ
63. Thoms, John, Mayor, Borough of New Providence, NJ
64. Tittel, Jeff, Sierra Club, NJ Chapter, Trenton, NJ
65. Torsilieri, Carl J., Mayor, Borough of Far Hills, NJ
66. Town of Harrison, NJ
67. Township of Roxbury, NJ
68. Township of Springfield, NJ
69. Union Township Committee (Hunterdon County), NJ
70. Van Den Kooy, Peter, on behalf of Oceanport Borough, NJ
71. Van Den Kooy, Peter, on behalf of Oldmans Township, NJ
72. Van Den Kooy, Peter, on behalf of the Borough of Spring Lake Heights, NJ
73. Van Den Kooy, Peter, on behalf of the Borough of Beachwood, NJ
74. Vas, Joseph, Mayor, City of Perth Amboy, NJ
75. Voros, Peter I., Mayor, Township of Pittsgrove, NJ
76. Voyce, William, Mayor, Township of Tewksbury, NJ
77. Walsh, Kevin, Fair Share Housing Center, Cherry Hill, NJ
78. Watkins, Matthew U., Township of South Brunswick, NJ
79. West Windsor Township, NJ

80. Zappasodi, Anthony J., Woolwich Township, NJ

As explained below, the repeal of N.J.A.C. 5:95 was not adopted. As a result, proposed N.J.A.C. 5:95 is recodified upon adoption as N.J.A.C. 5:96, and references to the new rules below use the recodified citations.

Summary of Public Comments and Agency Responses:

N.J.A.C. 5:96-General

COMMENT: The current rules should not be repealed since they apply to the three municipalities that received substantive certification pursuant to those rules.

RESPONSE: As the commenter is aware, the Appellate Division decision states that, "We do not disturb substantive certification approvals granted prior to the issuance of this decision." *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the Council on Affordable Housing*, 390 N.J.Super 1,88 (App. Div. 2007), *certif. denied*, 192 N.J. 71 (2007). The substantive certifications for the three municipalities granted third round substantive certification (Buena Borough/Atlantic County, Washington Township/Morris County and White Township/Warren County) shall remain in effect. As a result, N.J.A.C. 5:94 and 5:95 shall not be repealed and will remain in place for the three municipalities. N.J.A.C. 5:96-16 will be amended in the near future to include a provision for municipalities that received third round substantive certification on or before January 25, 2007 whose substantive certification is still valid. In addition, it is the Council's intent to provide interim procedures to govern those municipalities at the end of their substantive certification that will require the municipalities to address their remaining obligation for the 2014-2018 period of need.

COMMENT: The proposed rules require greater vigilance by local government, assign greater responsibility to the municipality and condense the timeframes for actions necessary for Council on Affordable Housing (COAH) compliance. The requirements for plan evaluation impose significantly greater monitoring tasks upon the municipality and require very tight deadlines for municipal response to COAH inquiry. Of greatest concern is that the rules start certification from the date a housing plan is filed, not from the date certification is issued. Given the amount of review necessary by COAH, this will undoubtedly consume valuable time as a community attempts to implement its plan within the timeframe established by COAH's 10-year period of substantive certification.

RESPONSE: The definition of "substantive certification" in N.J.A.C. 5:96-1.3 and 6.3(b) must be read in conjunction with N.J.A.C. 5:96-10.1. The commenter is correct with regard to the period of substantive certification; however, the municipality is subject to biennial plan evaluations only upon substantive certification. The commenter should also be aware that N.J.A.C. 5:96-11.1 requires that municipalities submit monitoring information at least once a year to COAH upon substantive certification. The Council believes the rules establish and enforce reasonable timetables for municipal compliance. Also, the Council has established specific standards for the information that must be included in a Housing Element and Fair Share Plan in Subchapters 2 and 3 of N.J.A.C. 5:97. The Council believes that the procedures outlined in N.J.A.C. 5:96 will expedite the processing of municipal petitions for substantive certification.

COMMENT: COAH failed to review the initial third round petitions as required by statute. The new rules need to include prescriptive penalties when COAH fails to respond in a timely manner. The commenter proposes that municipalities be given affordable unit credits as a function of delays in processing petitions for substantive certification.

RESPONSE: The commenter's suggestion would dilute the affordable housing need.

COMMENT: COAH should review each housing element within 45 days of a municipal submission. The purpose of the review should be to determine if the housing element has addressed COAH's review criteria for each compliance technique and whether the proposed compliance techniques address the entire municipal housing obligation. If the

housing element addresses the entire housing obligation, the housing element shall be accepted as filed. Municipal plans that fail to comply with the criteria should be returned to the municipality. COAH should not grant the benefits associated with filing a housing element until the municipality has addressed COAH's criteria for addressing the housing obligation. By requiring a municipality to submit a complete filing in order to receive the protection of COAH's administrative process, COAH will receive better plans. The public will be in a position to analyze the plan and understand the land use and fiscal implications of the plan. The general public and parties interested in building affordable housing will be in position to file a complete objection.

RESPONSE: The Council believes the commenter's concerns are addressed in Subchapter 3 of N.J.A.C. 5:97. In addition, the commenter should note that COAH staff will review each mechanism for compliance with the rules and regulations to ensure that the municipality's plan will meet its overall affordable housing obligation, as set forth in N.J.A.C. 5:97-2.4.

COMMENT: It should be mandatory that towns have to come in and get certified. The commenter opposes builder remedy suits which give both the environment and affordable housing a bad name. There has to be a way of working to make sure the State meets the affordable housing needs, protects the environment and channels the growth where it's most appropriate. The commenter believes that COAH should be working to make sure that the State provides the affordable housing that is needed and also protects the environment and balances the growth in this state.

RESPONSE: The Council appreciates the comment. The commenter should note that sites proposed for inclusion in the Fair Share Plan should be environmentally suitable and in accordance with sound land use planning. All sites are subject to the expanded site suitability criteria described in N.J.A.C. 5:97-3.13(b)3 through 5. The portions of these sites slated for development must be free of wetlands, category one waterways, and steep slopes in excess of 15 percent if regulated at the local level. Historic sites will be protected from development. In addition, the Council will consider the regulations of the Department of Environmental Protection (DEP), the New Jersey Meadowlands Commission, the Highlands Water Protection and Planning Council, and the Pinelands Commission when reviewing the suitability of sites.

COMMENT: What is the Council doing to try to provide an incentive for towns to submit petitions for substantive certification?

RESPONSE: The Council believes that participation in its process fulfills the constitutional affordable housing obligation, provides the municipality with protection from litigation, provides flexible options for addressing the affordable housing obligation, creates the opportunity to engage in sound land use planning, provides opportunities for public participation and provides priority access to funding. Municipalities participating in the Council's process are also able to collect development fees from market rate development to meet their affordable housing obligations. In addition, the Council will propose an amendment to N.J.A.C. 5:97 in the near future to provide an incentive to municipalities that submitted petitions pursuant to the 2004 rules to continue to participate in the COAH process. Specifically, municipalities will be eligible for a two for one compliance bonus for municipalities that approved affordable housing units between December 20, 2004 and June 2, 2008, provided the units were included in a third round fair share plan submitted to the Council prior to January 25, 2007.

N.J.A.C. 5:96-1.3

COMMENT: The definition of "Filed Housing Element and Fair Share Plan" states that "submission" to COAH of a Housing Element and Fair Share Plan accompanied by a duly-adopted resolution of the governing body endorsing same qualifies as a filing, thereby securing the protections of COAH jurisdiction. COAH should add a provision that clearly states that, upon submission of a "filed Housing Element and Fair Share Plan," the municipality shall fall within the jurisdiction of COAH, subject to rejection of its filing pursuant to N.J.A.C. 5:96-2.2(c).

RESPONSE: The Council believes N.J.A.C. 5:96-1.2, Jurisdiction, addresses the commenter's suggestion.

COMMENT: The Council should expand the definition of "affordability controls" to extend to controls other than UHAC, such as the LIHTC deed restriction or other HUD program deed restrictions.

RESPONSE: This comment will be addressed in a future rule amendment.

COMMENT: The Council should expand the definition of "affordable unit" to include all deed restricted units created through State and Federal funding programs, including Low Income Housing Tax Credits (LIHTC) and the U.S. Department of Housing and Urban Development (HUD).

RESPONSE: This comment will be addressed in a future rule amendment.

N.J.A.C. 5:96-2.2

COMMENT: This regulation addresses the notice and filing requirements for a municipality that petitions for substantive certification. The commenters request COAH to require that the Housing Element and Fair Share plan be posted on the Internet. The electronic version that must be provided only "if possible" by N.J.A.C. 5:95-2.2 should be mandatory and it should be made available on COAH's website. This would encourage public participation in the COAH process.

RESPONSE: The Council appreciates the commenter's suggestions. However, every municipality may not have the resources to provide the information electronically.

COMMENT: A "filed" housing element and fair share plan (HE/FSP), and an HE/FSP that is the subject of a municipal petition for substantive certification requires endorsement by the governing body. Thus, contrary to earlier suggestions, the HE/FSP that is endorsed by the governing body must be congruent with (that is, identical with) the HE/FSP adopted by the planning board. Otherwise, delay will ensue, mediation will involve municipal team members at odds, and implementation of any plan will be impeded because one body charged with implementation, that is, the planning board through hearings on development applications and master plan consistency review of development regulations, will be at odds with be at odds with another body, that is, the governing body, charged with adopting the zoning ordinances.

RESPONSE: The Council concurs with the commenter.

N.J.A.C. 5:96-2.2(a)

COMMENT: COAH must explain how its completeness review will expedite its process. COAH should ensure, in this review, that the municipality has addressed each of the criteria for each compliance technique. However, this review can make no findings regarding any compliance technique; because, as of this point in the process, the municipality has not petitioned for substantive certification and no party has been allowed to file an objection.

RESPONSE: The Council has established specific standards for the information that must be included in a Housing Element and Fair Share Plan in Subchapters 2 and 3 of N.J.A.C. 5:97. The commenter should note that the proposed rules are an attempt to streamline a process that previously (N.J.A.C. 5:91-3.1) did not require a completeness review of the Housing Element and Fair Share Plan. The Council believes that the procedures outlined in N.J.A.C. 5:96 will expedite the processing of municipal petitions for substantive certification. If the petition is deemed incomplete the municipality has 45 days to correct all deficiencies, failure to do so will result in an automatic rejection of the municipality's filing and dismissal from the Council's jurisdiction. The commenter should be aware that in the event COAH staff issues a report requesting additional information, the municipality will have 45 days to provide the information requested by the Council. If the municipality fails to submit the required information, the Council will issue a denial report. The municipality must respond to the denial with the requested information within 60 days or be dismissed by the Council, in accordance with the requirements for the FHA. These clearly defined timetables will expedite the substantive certification process. The Council believes the rule establishes the shortest time frames possible

given the requirements for notification, report preparation, and the time for the municipality or objector to provide additional information.

N.J.A.C. 5:96-3.2

COMMENT: COAH should require a municipality to address COAH's criteria for each compliance technique in its plan at the time of the original petition for substantive certification. COAH cannot determine if the municipality has provided a realistic opportunity if it requires a mere outline of what the municipality proposes to implement in the future.

RESPONSE: The Council has established specific standards for the information that must be included in a Housing Element and Fair Share Plan in Subchapters 2 and 3 of N.J.A.C. 5:97. The commenter should note that the proposed rules are an attempt to streamline a process that previously (N.J.A.C. 5:91-3.1) did not require a completeness review of the Housing Element and Fair Share Plan. The Council believes that the procedures outlined in N.J.A.C. 5:96 will expedite the processing of municipal petitions for substantive certification.

COMMENT: COAH should reduce the checklist of requirements for the initial housing element submission to permit something achievable, and require subsequent submissions of supplemental documentation within limited timelines. This approach would enable municipalities to respond intelligently and with better thought-out plans that have had the opportunity for some meaningful public input, community assessment and acceptance.

RESPONSE: The Council will have a Housing Element and Fair Share Plan application available to assist municipalities in navigating the COAH process. The application will indicate the information that is required at the time of petition and the information necessary after certification is granted. In addition, the municipality will have the opportunity to submit supplemental information in response to a report issued by the Council. The rules also include an option available to a municipality to phase certain components of its plan based on the feasibility of the proposed mechanisms. It is the Council's intent for the rules to provide a level of flexibility so that a municipality can comply with the prescribed timelines and deadlines.

COMMENT: The municipality previously submitted supporting documentation such as our Master Plan and zoning ordinances. Will this material have to be resubmitted again? This will cause additional unwarranted costs to be incurred.

RESPONSE: If the municipality has not made changes to these documents, they need not be resubmitted. If changes have been made, they would need to be submitted.

COMMENT: COAH should not make any substantive decisions regarding a municipal housing element and fair share plan until all parties have had an opportunity to file objections. It is impossible for COAH to make intelligent, objective decisions if it receives information from only one party.

RESPONSE: The 45-day objector period starts after the notice of publication. The commenter should note that the premeditation report is issued 60 days after the expiration of the 45-day objector period, which includes information submitted by all parties.

N.J.A.C. 5:96-3.2(c)

COMMENT: This section should be deleted because the adoption of development fee ordinances and the imposition of development fees should be encouraged even before a municipality has petitioned for substantive certification. For instance, a municipality that has filed its plan is well within its right to delay petitioning COAH for substantive certification for up to two years. See N.J.A.C. 5:96-3.1. By refusing to review development fee ordinances until a formal petition, COAH is unnecessarily denying towns the opportunity to collect affordable housing funds. Therefore, the provisions of N.J.A.C. 5:96-3.2 and 5.1 should be amended accordingly to state that, once a municipality has filed its duly-adopted and endorsed Housing Element and Fair Share Plan, COAH will review the municipality's

development fee ordinance.

RESPONSE: The New Jersey Supreme Court, in *Holmdel Builder's Ass'n v. Holmdel Township*, 121 N.J. 550 (1990) (issued December 13, 1990), determined that mandatory development fees are both statutorily and constitutionally permissible. The Court further anticipated that the Council would promulgate development fee rules specifying the standards for development fees. The Council has determined that a benefit to participating in the Council's administrative process is the ability to collect development fees. The Council also believes that the collection of fees should be an integral part of a comprehensive planning process that addresses the municipality's entire housing obligation. The fees should be reviewed in the context of how they help the municipality address this housing obligation, which can only be done if a municipality petitions for substantive certification. The Council believes that this approach is consistent with the Supreme Court's view that development fees are a constituent part of the overall plan to provide for the entire housing obligation.

N.J.A.C. 5:96-3.4(c)

COMMENT: The Council should not limit the number of changes that can be made to an approved plan. Regulatory land use rules and regulations change, as do funding programs, over time and the municipalities should have the flexibility to entertain worthy projects when they are presented.

RESPONSE: The Council does not limit amendments to a certified plan. A municipality may amend its certified plan as many times as it wishes.

COMMENT: COAH should explain what it is trying to accomplish by limiting a municipality to three petitions. A municipality should not be allowed three petitions for substantive certification prior to receiving its initial certification. However, after receiving substantive certification, there may be legitimate reasons for amending a plan.

RESPONSE: The Council has established specific standards for the information that must be included in a Housing Element and Fair Share Plan in Subchapters 2 and 3 of N.J.A.C. 5:97. The commenter should note that the proposed rules are an attempt to streamline a process that previously (N.J.A.C. 5:91-3.1) did not establish a limit on the number of times a municipality could submit a petition. After substantive certification, there is no limit to the number of times a municipality may amend its plan.

N.J.A.C. 5:96-3.5

COMMENT: This municipality utilizes the Star Gazette and the Express-Times as its legal notice newspapers. This is done via resolution as required by statute. When its initial third round petition was filed, COAH required the Township to redo its public notice using the Star Ledger. The commenter believes this is a violation of the Open Public Meetings Act. If COAH is not going to clearly define what the standards are for legal notice mechanisms, it must provide a letter from the New Jersey State Attorney General guaranteeing legal defense should a municipality be cited for using non-standard legal notice newspapers. If COAH inappropriately mandates the use of the Star Ledger it should also pay for that expense.

RESPONSE: The Council believes that its legal notice requirements are necessary and appropriate and do not violate the Open Public Meetings Act. The public notice shall be in the legal newspaper of the municipality as well as one that is widely circulated within the county if the legal newspaper is not widely circulated within the county. If the Council's Executive Director determines that notice was not published in a newspaper of general circulation, the municipality shall be required to re-publish in another appropriate newspaper. However, the Council will list all newspapers that meet the rule requirement on its website.

N.J.A.C. 5:96-3.7(a)2

COMMENT: The service list must include the owners of all sites that are zoned to create affordable housing, including all owners in all zoning districts impacted by ordinances that impose a requirement to build affordable housing.

RESPONSE: The Council agrees with the commenter.

N.J.A.C. 5:96-3.8(a) and 8.3

COMMENT: COAH should amend these rules to require site specific relief if a municipality fails to adopt a plan that complies with COAH's criteria for a realistic opportunity. The relief granted should be in direct proportion to the shortfall in the municipal plan. The relief must provide a density bonus as an incentive to build affordable housing. Such a rule change would provide an incentive for the municipality to create a sound plan. It will provide an incentive to objectors to participate in the COAH process. It will provide incentives to negotiate during mediation. All of these incentives promote the production of affordable housing.

RESPONSE: N.J.A.C. 5:96-8.5(c) allows the Council to do what the commenter suggests.

N.J.A.C. 5:96-3.8(a) and 8.5(d)

COMMENT: COAH should amend N.J.A.C. 5:96-3.8(a) and 8.5(d) to require site specific relief to address any shortfall in the municipal response to its housing obligation. Such relief should be in direct proportion to the shortfall in the municipal plan. COAH must develop criteria as to which developer(s) receive relief and the relief must provide an incentive (density bonus) to construct affordable housing.

RESPONSE: There are numerous issues that may need to be reconciled during mediation. The suitability of a site must always be established, and other issues such as the density of development, design standards to be applied, buffers and other particulars may be discussed during mediation, which would all be considered as the Council decides whether or not the objector's site should be included in a municipal plan to address a shortfall.

N.J.A.C. 5:96-3.8(b)

COMMENT: This applies to communities that have filed a housing plan with COAH and seems to indicate that the community is not afforded immunity even though there has been municipal action to comply with COAH requirements.

RESPONSE: N.J.A.C. 5:96-3.8(b) remains unchanged and must be read in its entirety. The provision indicates that the Council shall require inclusion of the "contested site" in a municipal Housing Element and Fair Share Plan "after the filing of a Housing Element and Fair Share Plan where a petition for substantive certification was not submitted within two years of the filing, and the case is transferred to the Council by the court. . .".

N.J.A.C. 5:96-4

COMMENT: A rule should be established covering objections. Too many times objectors are seeking to use COAH to further their own financial objectives and having very little interest in those in need of affordable housing. How many settlements has COAH seen, that actually involve the construction of no new affordable housing? The commenter suggests that once an objection is filed by a landowner/developer seeking site specific relief for one or more parcels, that any settlement must include the development of affordable housing on the subject property and the set aside shall not be less than 30 percent. A 20 percent set aside is now rendered meaningless in that it will only satisfy the growth being created by the project itself and will not address the remaining municipal obligation.

RESPONSE: The Council fully expects that affordable housing will be included in any agreement reached through the Council's mediation process.

N.J.A.C. 5:96-4.1

COMMENT: Please state how an objector who believes COAH's regulations are unconstitutional or otherwise illegitimate, either as applied or facially, can create a record for an appeal. COAH may choose to reject claims that its rules and regulations are for some reason invalid, but it should not bar those claims from being made because by doing so will deprive objectors of due process.

RESPONSE: The proper jurisdiction to claim the regulations are invalid or unconstitutional is before the Appellate Division not through the Council's mediation process.

N.J.A.C. 5:96-4.1(a)

COMMENT: COAH should not limit the content of an objection. The parties can sort out the importance of each objection during mediation.

RESPONSE: The Council does not believe it is unreasonable to require objectors to specify the reasons for the objection.

N.J.A.C. 5:96-4.2(a)

COMMENT: The rule does not provide a time limit for COAH to review completeness of an objection. The lack of a deadline imposes uncertainty in the process.

RESPONSE: This rule is the same as that at N.J.A.C. 5:91-4.2(a). The Council does not believe the absence of a deadline for an objection to be deemed complete imposes an uncertainty in the process. It has been the Council's practice to review objections as quickly as practicably so that the parties involved can begin establishing teams so that mediation can commence.

N.J.A.C. 5:96-4.2(c)

COMMENT: COAH should not provide 20 days for the municipality to respond to each objection. It adds an unnecessary delay to a process that already offers many opportunities to each party in mediation to respond to each others positions.

RESPONSE: N.J.A.C. 5:96-4.1(a)5 requires the objector to submit a statement documenting prior efforts at pre-mediation, participation in conferences or public hearings and a summary of the results of any such efforts. The Council believes that this provision provides the municipality and the landowner/developer an opportunity to discuss the potential of the site in question. If the discussions reach an impasse and the Council receives an objection from the landowner/developer, the municipality should have enough knowledge about the site to respond well within the 20 day period. The Council believes that the municipal response would expedite, not delay, the process.

COMMENT: COAH should extend the period of time a municipality has to respond to an objection from 20 days to 45 days. Twenty days is not enough time to potentially analyze a new site or program that is being initially offered by an objector.

RESPONSE: N.J.A.C. 5:96-4.1(a)5 requires the objector to submit a statement documenting prior efforts at pre-mediation, participation in conferences or public hearings and a summary of the results of any such efforts. The Council believes that this provision provides the municipality and the landowner/developer an opportunity to discuss the potential of the site in question. If the discussions reach an impasse and the Council receives an objection from the landowner/developer, the municipality has enough knowledge about the site to respond well within the 20-day period.

N.J.A.C. 5:96-4.2(d)

COMMENT: COAH should add a section that establishes the principle that all objectors and owners of sites, designated in the municipal plan for affordable housing, are parties to a case before COAH. The rule should be clear that COAH and each of the parties shall copy each other on any written communication, including email correspondence.

RESPONSE: The Council agrees with the commenter that all parties must provide any written correspondence to the Council and to the service list. However, the Council believes that it would be unduly burdensome to require all email communications to be copied to the service list. Further, COAH planners regularly communicate with municipalities as part of plan review. The Council believes these communications are reasonable and necessary to facilitate review and certification of the municipality's affordable housing plan through COAH's administrative process.

N.J.A.C. 5:96-6 and 7

COMMENT: These rules allow COAH to give itself more time for review if the number of petitions is high, yet provides no such allowance for the municipality. Please explain the rationale for this.

RESPONSE: The Council believes the rules establish and enforce reasonable timetables for municipal compliance. However, the commenter should note that it is the Council intention to complete the review within 60 days; however, the Council also realizes that additional staff and resources would help streamline and expedite the review process.

N.J.A.C. 5:96-6.2

COMMENT: There needs to be a process for streamlining applications through the Council review process. The Council has limited staff resources and this has hindered their ability to fulfill the statutory requirements. The staffing issue should be resolved, or additional resources should be sought such as third party, professional planners to act as reviewers and/or mediators; or a self-certification process can be developed whereby a municipality hires a professional planner, who would be qualified by COAH, to perform such duties.

RESPONSE: The Council will have a Housing Element and Fair Share Plan application available to assist municipalities in navigating the COAH process and to standardize municipal submissions. In addition, COAH staff will streamline the reports so that reviews can be done expeditiously. The Council will consider the commenter's suggestion to further expedite the process.

COMMENT: Under the Council review provisions, the commenter would urge the Council to strongly consider adding additional internal staff resources to help streamline and expedite the Review process. Over the past several years, the Council has sought to address our State's need for affordable housing with limited staff resources, and this has been reflected in the fact that only a handful of municipalities have successfully secured substantive certification for their plans. The Council clearly needs additional resources, in staff and budgetary funding, to effectively perform their tasks and successfully complete their statutory responsibilities. It is the Commenter's hope that this funding issue will be addressed by the Administration moving forward.

RESPONSE: The Council agrees with the commenter that additional staff and resources would help streamline and expedite the review process.

N.J.A.C. 5:96-6.2 and 7.2

COMMENT: COAH must streamline its reports and confine itself to reviewing municipal plans in the context of its regulations. COAH should eliminate advice that is not related to the review of techniques designed to create affordable housing.

RESPONSE: The Council's Executive Director and staff planners are in regular contact with all parties during the review process. It is the Council's responsibility to work with municipalities to obtain substantive certification. These

contacts are distinct from the mediation process where the mediator reviews the plan and engages in discussions with the participants to mediation regarding the contents of the municipality's plan only within the scope of mediation. The Council will have a Housing Element and Fair Share Plan application available to assist municipalities in navigating the COAH process. In addition, COAH staff will streamline the reports so that reviews can be done expeditiously.

N.J.A.C. 5:96-6.2(a)

COMMENT: COAH states in its "summary of regulations" that "the shortened timeframe reflects the more in-depth review required to determine completeness of the petition." This seems contradictory, in that less time would imply less in-depth review. Moreover, the new rules also reduce the timeframe for a municipality to respond with additional information and/or necessary revisions to the Housing Element and Fair Share Plan outlined in the report requesting additional information from 90 days to 60 days. Ninety days is needed and the regulation should be revised accordingly. Further, just as N.J.A.C. 5:96-6.2(a) expressly provides for reasonable extensions for COAH staff to issue its compliance report, N.J.A.C. 5:96-6.2(c) should expressly provide for reasonable extensions for municipal responses to such reports.

RESPONSE: The statement referenced by the commenter is not contradictory. The Council has added an upfront petition completeness review to which municipalities have 45 days to respond. Therefore, the Council believes it is reasonable to shorten the timeframe for response to a COAH report requesting additional information to 45 days. The Council believes the rules establish and enforce reasonable timetables for municipal compliance. The Council may grant extensions, if necessary, in limited circumstances, but believes the rule does not need to be changed.

COMMENT: The rule allows more time for review of the housing plan by COAH "based on the resources of the council's staff to process such petitions." The lack of a timeline imposes severe issues to municipal government in satisfying the affordable housing obligation within the period of certification, particularly since a portion of the rules stipulate certification starts from the filing date.

RESPONSE: It is the Council's intention to have petitions reviewed within 60 days after the 45-day objector/comment Period. However, the Council believes this section is necessary in anticipation of the large volume of petitions that are anticipated to be filed in accordance with N.J.A.C. 5:96-16.2.

N.J.A.C. 5:96-6.2(a) and 7.2(a)

COMMENT: COAH must complete its review within 120 days after the objector period expires or any party should be able to move jurisdiction to the Superior Court.

RESPONSE: The Council will review municipal submissions as expeditiously as possible. In limited situations, the time period may extend beyond 120 days but allowing a transfer to the Superior Court at that time does not advance the affordable housing process. It has been the Council's experience that litigation does not necessarily expedite the production of affordable housing. The commenter should also note that the Council's process is voluntary and allowing an objector to transfer to the Superior Court is akin to a builder's remedy lawsuit.

N.J.A.C. 5:96-6.2(c)

COMMENT: This section should be changed to have different schedules for responding to COAH, depending on the complexity of the response required. If additional supplementary information is required, 60 days is, in most cases, a fairly reasonable response time. However, if a revised Housing Element and Fair Share Plan and re-petition is required, this cannot be accomplished in 60 days. A minimum of 90, and in some cases, 120 days, are needed to develop, prepare and adopt a new Housing Element and Fair Share Plan (which requires a duly noticed public hearing) and to have the governing body adopt its resolution petitioning COAH for certification.

RESPONSE: The Council believes the rules establish and enforce reasonable timetables for municipal compliance, and do not allow municipalities to delay proceedings. Specific time frames have been established for every step of the process, many where there were none in the first and second round rules. For instance, municipalities must respond to a report requesting additional information within 60 days or the Council shall issue a denial. Municipalities must submit additional information and/or necessary revisions to the Housing Element and Fair Share Plan within 60 days of the issuance of a report. The Council also believes that the proposed definitive timelines and standards for review are realistic and achievable.

COMMENT: COAH should extend the period of time a municipality has to potentially address a COAH report requesting additional information if an amendment to the town's housing element and fair share plan and a repetition is required from 60 days to 120 days. Sixty days is not enough time to develop a revised plan and then formally amend the plan at a planning board hearing and endorse the plan at a governing body meeting.

RESPONSE: The Council believes the rules establish and enforce reasonable timetables for municipal compliance.

N.J.A.C. 5:96-6.2(c) and 7.2(b)

COMMENT: When a municipality responds to a staff report for more information, it must address all of COAH's criteria for creating a realistic opportunity for each compliance technique in its plan. COAH cannot determine if a municipality has created a realistic opportunity if it does not have this information.

RESPONSE: The Council agrees with the commenter the municipality must address all the items delineated in a report requesting information so that COAH can determine whether or not the realistic opportunity for affordable housing has been demonstrated by the municipality.

COMMENT: If the COAH process is to be efficient, COAH must adhere to its deadlines.

RESPONSE: The Council intends to adhere to its deadlines. However, the Council also recognizes that additional time for Council review may be needed in anticipation of the large number of petitions that are anticipated to be filed in accordance with N.J.A.C. 5:96-16.2.

COMMENT: By the time a municipality responds to the staff reports envisioned at N.J.A.C. 5:95-6.2(a) and 7.2(a), it has had three opportunities to adopt a compliant plan. If the municipality cannot respond to the staff report with a plan that addresses COAH's criteria for each compliance technique, it should be dismissed from COAH's process.

RESPONSE: The Council's rule provides for dismissal when the Council determines that a municipality has three times failed to develop an acceptable Housing Element and Fair Share Plan. In every case, such a determination shall only be made after a municipality has had a chance to respond to a compliance report. The commenter should be aware that in the event COAH staff issues a report requesting additional information, the municipality will have 45 days to provide the information requested by the Council. If the municipality fails to submit the required information, the Council will issue a denial report. The municipality must respond to the denial with the requested information within 60 days or be dismissed by the Council, in accordance with the requirements for the FHA. These clearly defined timetables will expedite the substantive certification process.

N.J.A.C. 5:96-6.2(e)

COMMENT: A finding that a municipal repetition still requires the designation of additional inclusionary sites, a change in inclusionary sites, a substantial change in density or a fundamental change in approach must result in dismissal from the COAH process. COAH must eliminate the permissive language in the rule.

RESPONSE: The Council does not believe the rule is permissive. The rule clearly indicates that the petition "shall" be dismissed unless the Council authorizes an additional re-petition.

COMMENT: The discretionary language in this section must be eliminated. COAH must dismiss municipalities from its administrative process.

RESPONSE: The Council does not believe the rule includes discretionary language. The rule clearly indicates that the petition "shall" be dismissed unless the Council authorizes an additional re-petition. The municipality would have to demonstrate why it should be permitted to remain under the Council's jurisdiction.

COMMENT: The proposed rule envisions dismissal if the housing element requires substantial changes, such as the designation of additional inclusionary sites, a change in inclusionary sites, a substantial change in density or a fundamental change in approach. This language must be broadened to require dismissal if a municipality fails to address COAH's criteria for each compliance technique in the municipal plan. This latter language covers a situation in which the concepts in the plan are fine; but the municipality fails to provide any of the information that creates a realistic opportunity. For example, the concept of constructing affordable housing on a municipal site is fine; but it is meaningless without knowing information about the site and how the municipality is going to fund and construct the housing.

RESPONSE: The Council believes the commenter's concerns are addressed in Subchapter 3 of N.J.A.C. 5:97. In addition, the commenter should note that COAH staff will review each mechanism for compliance with the rules and regulations to ensure that the municipality's plan meet its overall affordable housing obligation, as set forth in N.J.A.C. 5:97-2.4.

N.J.A.C. 5:96-6.3

COMMENT: COAH needs to have real enforcement power to insure that the affordable housing that is specified in a municipality's substantively certified housing plan is actually built. For example, COAH should impose fines on recalcitrant municipalities and contribute the money to non-profit organizations which will actually build the housing. In the alternative, COAH should treat the substantive certification as a contract with one remedy for breach of contract being specified performance by the municipality of all the requirements within its authority necessary to build the housing.

RESPONSE: The Council believes that its rules contain adequate enforcement provisions. The Fair Housing Act (FHA) establishes COAH as a voluntary process. Municipalities that do not meet the terms of substantive certification are subject to dismissal from the COAH process.

COMMENT: Previous experience has shown that COAH can take several months to review housing plans. Many communities filed third round plans in 2005 and have been waiting for more than two years for the COAH process to complete. It makes more sense for certification to be 10 years from the date of certification, not filing. Obviously, establishing the filing date as the start is an attempt by COAH to get all municipalities on the same schedule so that they all expire no later than 2019. This attempt to force uniformity through a blanket deadline fails to account for individual circumstances.

RESPONSE: The Council believes the rules establish and enforce reasonable timetables for municipal compliance. Also, the Council has established specific standards for the information that must be included in a Housing Element and Fair Share Plan in Subchapters 2 and 3 of N.J.A.C. 5:97. The Council believes that the procedures outlined in N.J.A.C. 5:96 will expedite the processing of municipal petitions for substantive certification.

COMMENT: A municipality should apply for and receive substantive certification within a year after filing a Fair Share and Housing Element Plan. Allowing a municipality that does not complete the certification process to be protected indefinitely is unfair to all others that work towards solving this issue.

RESPONSE: The Council believes the grant of substantive certification should not be based on time spent in the COAH process but rather based on compliance with the Council's rules. However, the Council concurs with the

commenter that the Council should certify municipalities as expeditiously as possible and, toward that end, will make available a model application to streamline and standardize municipal submissions.

N.J.A.C. 5:96-6.3(c)

COMMENT: This is a vague and overpowering regulation. The certification process should simply require a community to meet its obligation.

RESPONSE: This language derives from N.J.S.A. 52:27D-314, Review of petition; substantive certification; findings; issuance, denial or conditional issuance; refilling; time for adoption of ordinance.

N.J.A.C. 5:96-7.2

COMMENT: The procedural rules should require COAH to dismiss a housing element if a municipality fails to respond to a report requiring additional information within 60 days. The municipal response must adequately respond to the criteria COAH has established for creating a realistic opportunity for each compliance technique offered in the municipal plan.

RESPONSE: This would be in violation of N.J.S.A. 52:27D-314(b).

N.J.A.C. 5:96-7.2(a)

COMMENT: The rule allows COAH more time for review "in the event that the number of petitions for substantive certification exceeds the resources of the Council's staff to process the petitions." The lack of a deadline for COAH review negatively impacts the municipality's timeline for implementing the housing plan.

RESPONSE: The rules do not prohibit a municipality from implementing the terms of its adopted Housing Element and Fair Share Plan prior to COAH's grant of substantive certification. It is the Council's intention to have petitions reviewed within 60 days after the 45-day objector/comment period. However, the Council believes this section is necessary in anticipation of the large volume of petitions that are anticipated to be filed in accordance with N.J.A.C. 5:96-16.2.

N.J.A.C. 5:96-7.3(c)

COMMENT: COAH should extend the period of time a municipality has to potentially address a COAH pre-mediation report if an amendment to the town's housing element and fair share plan and a repetition is required from 60 days to 120 days. Sixty days is not enough time to develop a revised plan and then formally amend the plan at a planning board hearing and endorse the plan at a governing body meeting.

RESPONSE: The Council believes the rules establish and enforce reasonable timetables for municipal compliance.

N.J.A.C. 5:96-8

COMMENT: The rules have a reduced timeframe for mediation from 120 days to 90 days. The rules allow mediation prior to a pre-mediation report if objections are not relevant to compliance mechanisms. Given the full time employment schedules of many elected officials, the 90-day schedule condenses the timeframe too tightly.

RESPONSE: The commenter should note that mediation may be extended in accordance with N.J.A.C. 5:96-8.3(e).

COMMENT: Following mediation, the staff should release a mediation report and its report of the municipal plan. The staff report of the municipal plan should provide specific direction that must be addressed within specific time limits. Failure to address the staff's comments within the required time limits must result in dismissal from COAH's

process.

RESPONSE: The Council believes that this exercise would be redundant, since the mediation report provides direction and a deadline.

COMMENT: COAH must hire outside mediators to be able to manage its case load. The parties to mediation can share in the costs of the mediators.

RESPONSE: The Council believes that N.J.A.C. 5:96-8.1 addresses the commenter's concern since the Council's Executive Director can appoint a designee to act as the mediator in his or her place.

COMMENT: COAH should begin mediation within 30 days after COAH determines a municipality has filed a housing element and the municipality has petitioned for substantive certification. Mediation should end prior to the issuance of the staff review of the municipal housing element. Conducting mediation prior to the issuance of the staff review will promote negotiations designed to create affordable housing.

RESPONSE: The 45-day objector period starts after the notice of publication. The premeditation report is issued 60 days after the expiration of the 45-day objector period. The mediation session is scheduled as quickly as practicable after the report is issued and mediation may be conducted for a maximum of 90 days after the first scheduled mediation. While the Council notes the commenter's concerns that expediting mediation may promote resolution, it may also adversely create delays in the Council's process.

N.J.A.C. 5:96-8.1

COMMENT: Developers who have filed formal objections to a municipality's earlier third round compliance plan should be granted expedited mediation, before municipalities are required to formulate the later, revised third round plans. Otherwise, the past three years have been wasted and subject developers to unfair burdens and delay.

RESPONSE: The commenter's suggestion can be implemented prior to the municipal submittal of a revised third round plan, so long as all parties agree to mediation. The Council will strive to expedite mediation in these instances.

N.J.A.C. 5:96-8.2(c)

COMMENT: This provision places exceedingly specific limits on the composition of a municipal mediation team whereas an objector is only limited by the number of representatives and also may be permitted more representatives by the mediator (N.J.A.C. 5:96-8.2(b)). This gives the objector the unfair advantage over the municipality. The rules should be uniform as applied to both parties. A maximum of four for each party is more equitable.

RESPONSE: N.J.A.C. 5:96-8.2(b) indicates that an objector is permitted a team of not more than three representatives and N.J.A.C. 5:96-8.2(c) indicates the municipality is allowed two additional representatives in addition to a member of the municipal planning board and a member of the municipal governing body (who shall not be the same individual). The Council believes that the planning board and governing body representatives are needed because the mediation process is advanced based on the representatives authorized to execute any written agreement reached during mediation.

N.J.A.C. 5:96-8.3

COMMENT: By the time a municipality responds to the staff report for more information, it has had three opportunities to address COAH's criteria for a realistic opportunity. If it fails and COAH allows the municipality to participate in mediation, COAH should require one or more developer sites to be included in the municipal plan. COAH should allow 90 days for the parties to negotiate a resolution of the dispute. If the parties cannot resolve the dispute, COAH should schedule a hearing to address the shortfall of the plan and any issues associated with the suitability of an

objector's site.

RESPONSE: N.J.A.C. 5:96-12.3 allows the Council to do what the commenter suggests.

N.J.A.C. 5:96-8.3(a)

COMMENT: COAH should clarify the circumstances that would result in an early scheduling of mediation. Specifically, COAH should provide examples of objections that are not relevant to compliance mechanisms.

RESPONSE: The Council does not believe this is necessary because the rule indicates that objections not relevant to the compliance mechanisms may be scheduled for mediation prior to the issuance of a report.

N.J.A.C. 5:96-8.3(e)

COMMENT: COAH must impose strict time limits on mediation. It should be conducted for 90 days with one 90-day extension possible.

RESPONSE: The Council believes that the initial 90-day mediation period provides a sufficient amount of time to conduct mediation. The commenter should note that an extension may be allowed by the mediator for good cause shown.

N.J.A.C. 5:96-8.4(b)

COMMENT: At the end of mediation, if an objector submits an expert report raising an issue as to compliance with COAH's regulations, the issue(s) in dispute must be the subject of a COAH hearing or a referral to the Office of Administrative Law.

RESPONSE: Expert reports are not generally required from objectors. However, an expert report would certainly strengthen any objection filed, and expert reports are required by N.J.A.C. 5:96-9.1, in appropriate circumstances, to establish the necessity to refer a matter to the Office of Administrative Law for a hearing.

N.J.A.C. 5:96-8.5(a)

COMMENT: The rules stipulate only 60 days to amend the housing plan after mediation. This timeline is difficult to adhere to given notice requirements and difficulty achieving summer meeting quorums.

RESPONSE: The Council believes the rules establish and enforce reasonable timetables for municipal compliance.

COMMENT: COAH should extend the period of time a municipality has to amend its housing element and fair share plan and a repetition as a result of mediation from 60 days to 120 days. Sixty days is not enough time to develop a revised plan and then formally amend the plan at a planning board hearing and endorse the plan at a governing body meeting.

RESPONSE: The Council believes the rules establish and enforce reasonable timetables for municipal compliance.

N.J.A.C. 5:96-8.5(d)

COMMENT: If we are to achieve the maximum number of additional units practicable in our State, we must not lose sight that one of the greatest assets we have as a state to produce affordable housing is the value created by a change in zoning. See Exhibits 1 and 2 to Comments of Jeffery R. Surenian, dated December 5, 2003, incorporated by reference (containing appraisals demonstrating the extraordinary impact on land value of zoning sites to a multifamily zone for two parcels in Wall Township and one parcel in Holmdel Township). The Supreme Court recognized that we

must harness that value to maximize the production of affordable housing in *Mount Laurel II* at 267 n.29. COAH also came to the same conclusion when it prepared a very thoughtful Model Growth Share Ordinance. See Model Growth Share Provisions for an affordable Housing Ordinance, page 4 n. 7 (illustrating how application of municipalities can harness the value of increased density to achieve a 25 percent set-aside).

RESPONSE: The commenter should note that the Council would expect a substantial number of affordable units if and when site specific relief were to be granted. The Council will propose an amendment in the near future to address the issue of minimum densities and maximum presumptive set-asides.

COMMENT: In *J.W. Field Co. v. Tp. Of Franklin*, 204 N.J.Super. 445 (Law Div. 1985), Judge Serpentelli also stated that "[t]he goal [of the builder's remedy] is to devise a solution which maximizes the opportunity for lower income people and minimizes the impact on the municipality." *Id.* at 453. Therefore, if COAH should award a builder's remedy, it should keep this principle in focus.

RESPONSE: The commenter should note this provision only applies after the municipality has already submitted two petitions prior to certification and if a third petition is required to make the plan whole. The commenter should further note that the Council would expect a substantial number of affordable units if and when site specific relief were to be granted. There are numerous issues that may need to be reconciled during mediation. The suitability of a site must always be established, and other issues such as the density of development, design standards to be applied, buffers and other particulars may be discussed during mediation, which would all be considered as the Council decides whether or not the objector's site should be included in a municipal plan to address a shortfall.

COMMENT: If COAH awards a builder's remedy, it is important to be mindful of the principles established by the Supreme Court in *Mount Laurel II*-as viewed through the eyes of the judge charged with implementing *Mount Laurel II*-Judge Serpentelli. In *J.W. Field Co. v. Tp. of Franklin*, 204 N.J.Super. 445, 454 (Law. Div. 1985), a case that analyzes the objectives in *Mount Laurel II*, Judge Serpentelli emphasized "that there is [nothing] magical about the figure of 20%". *Id.* at 467. Judge Serpentelli was correct. An examination of the rationale for the presumptive set-asides COAH imposed for 18 years reveals that there was no report or foundation for those presumptive set-asides. See OPRA demand from Jeffrey R. Surenian to Maureen Fullaway, Executive Director, dated August 15, 2003 and COAH's Response, dated August 19, 2003 (revealing that COAH had no documents in response to a request for "all documentation that was the basis for COAH 'presumptively' requiring the various set-asides set forth in N.J.A.C. 5:93-5.6 (b)"). See also OPRA demand from Jeffrey R. Surenian to Maureen Fullaway, Executive Director, dated August 14, 2003 and COAH's Response (revealing that COAH had no documents in response to a request for "all documentation that was the basis for COAH 'presumptively' requiring the various set-asides set forth in N.J.A.C. 5:93-5.15(c)5"). The OPRA Demands and responses are incorporated by reference.

RESPONSE: The commenter should note that the Council would expect a substantial number of affordable units if and when site specific relief were to be granted. The Council will propose an amendment in the near future to address the issue of minimum densities and maximum presumptive set-asides.

COMMENT: This provision, in essence, authorizes a builder's remedy and is of great concern to municipalities. The whole point for a municipality to bring itself within COAH's jurisdiction is to secure insulation from a builder's remedy and the often outrageous negotiation demands of profit-driven developers. If COAH is going to extinguish the right of a municipality to determine its own destiny through a procedural regulation, COAH will simultaneously extinguish the incentive for municipalities to subject themselves to an administrative process that fails to offer adequate protections against the demands of developers. If COAH is going to suggest that a builder's remedy may be appropriate, COAH needs to make clear in the future as it has in the past that it will only require "site specific relief" in the rarest of circumstances and that it will respect the municipality's choices as to how to comply. If COAH fails to send this signal, objectors will use the mediation process to threaten municipalities and will seek to make COAH the enforcer of its threats if the municipality fails to capitulate. In almost all instances where a municipality fails to capitulate, COAH can expect that a municipality's refusal to be bullied will precipitate motions by developers asking COAH to use its

discretion to award site specific relief in direct contravention of the very purpose of the FHA, which was to create an alternative to the builder's remedy. See N.J.S.A. 52:27D-303.

RESPONSE: The commenter should note this provision only applies after the municipality has already submitted two petitions prior to certification and if a third petition is required to make the plan whole. There are numerous issues that may need to be reconciled during mediation. The suitability of a site must always be established, and other issues such as the density of development, design standards to be applied, buffers and other particulars may be discussed during mediation, which would all be considered as the Council decides whether or not the objector's site should be included in a municipal plan to address a shortfall. The commenter is correct in stating that the voluntary COAH administrative process was established by the FHA as an alternative to the courts and that one of the benefits in the COAH process is that municipalities are encouraged to engage in sound planning and choose from a variety of available mechanisms to address their affordable housing obligations.

COMMENT: This provision is too vague as to what circumstances would warrant COAH to require an objector's site to be included in a town's revised plan. Even if a municipality must repetition after mediation to add a new program or a new site, this proposed rule would allow COAH to potentially require an objector's site if COAH deemed that the revised plan had a shortfall. The commenter believes that COAH should permit the town an additional chance to amend the revised plan to cover the shortfall before COAH would contemplate the award in essence of a builder's remedy. COAH should only contemplate the award of a builder's remedy in narrowly defined conditions.

RESPONSE: There are numerous issues that may need to be reconciled during mediation. The suitability of a site must always be established, and other issues such as the density of development, design standards to be applied, buffers and other particulars may be discussed during mediation, which would all be considered as the Council decides whether or not the objector's site should be included in a municipal plan to address a shortfall. The commenter should note that this provision only applies after the municipality has already submitted two petitions prior to certification and if a third petition is required to make the plan whole.

COMMENT: If COAH does award site specific relief, it should make clear that where the developer is an objector, it must provide a "substantial" amount of affordable housing. The FHA--a statute written in response to *Mount Laurel II*--uses the word "substantial"--a term defined by *Mount Laurel II* and a term with enormous significance in that opinion. See N.J.S.A. 52:27D-304(f) (defining "inclusionary development" means a residential housing development in which a substantial percentage of the housing units are provided for a reasonable income range of low and moderate income households.) See also *Mount Laurel II* at 279 n. 37 (wherein the Supreme Court stated that even where a developer is entitled to a builder's remedy, the trial court should require the developer to reserve at least 20 percent and as far beyond that floor as warranted after considering the percentage of market units that "may be necessary to render the project profitable.") COAH should expect no less of developers to whom it awards site specific relief than the Supreme Court expected of developers who the trial judges found were entitled to builder's remedies. Although COAH has artificially suppressed set-asides for 18 years through its presumptive set asides, that must change if COAH is to give municipalities any chance the meet the soaring burdens COAH has imposed. Since every four units generates a growth share of one unit in most instances, COAH must enable a municipality to break through the glass ceiling of 20 percent or developers who secure site specific relief will in most instances do no more than satisfy the obligation their projects create leaving the municipality still facing an often colossal growth share burden. It can be done. The record before COAH regarding Holmdel, incorporated by reference, demonstrates that set-asides above 20 percent can be an effective way to generate more housing than the meager 20 percent presumptively allowed by COAH's round one/round two regulations. See Holmdel's Ordinance 84-7, adopted on August 24, 1984, otherwise known as the "Graduated Set-Aside Ordinance" and Correspondence of Jeffrey Kantowitz, dated July 8, 1996 (incorporated by reference revealing how the Township achieved set-asides of 29 percent pursuant to an ordinance so attractive that Hovnanian vigorously objected when the Township sought to comply without reliance on that ordinance) See also *Mount Laurel II* at 267 n.29 (wherein the Supreme Court references a study that shows that set-asides as high as 34 percent could be justified). An examination of the "Study of Economic Feasibility, Proposed Housing Program for Princeton," dated February 28, 1975, prepared by the Real Estate Research Corporation and referenced in *Mount Laurel II* at 267 n.29

further emphasizes the importance of "capturing a significant portion of the induced increment in land values" created by offering developers a density bonus. Indeed, "[a]t a density of six per acre," the study states that the set aside for low and moderate households "could be 40 percent or slightly higher." This study is incorporated by reference. In order to achieve maximum affordable housing yield practical, COAH has to adjust the expectations of the marketplace to those that existed in the wake of *Mount Laurel II*. In this regard, while developers will exclaim that they must have a bright line, *Mount Laurel II* at 279 n. 37 did not establish a bright line and that did not chill builder's remedy suits. Indeed, over a 100 lawsuits were brought in the wake of *Mount Laurel II* despite the fact that the second element of a builder's remedy required a "minimum" set-aside of 20 percent. See Frizell, 36 N.J. Prac., Land Use Law §18.4 (2d ed.)

RESPONSE: The commenter should note that the Council would expect a substantial number of affordable units if and when site specific relief were to be granted. The Council will propose an amendment in the near future to address the issue of minimum densities and maximum presumptive set-asides.

N.J.A.C. 5:96-9.1

COMMENT: The rule specifies that in a case referred to OAL all costs shall be split by the municipality and the objector. The responsibility for costs should be on the objector to ensure that the process is expedient and not extended to simply "wear down" the municipality.

RESPONSE: The commenter is incorrect. The provision indicates that the "cost of the transcript of all oral testimony transmitted to OAL from the Council shall be shared equally by the municipality and objectors."

N.J.A.C. 5:96-10.1

COMMENT: COAH should amend N.J.A.C. 5:96-10.1 to require COAH to solicit comments from objectors that participated in COAH's review and mediation process before the report is completed. Objectors can provide information about the plan that COAH would otherwise not receive. COAH should be able to weigh all the facts before issuing its plan evaluation report.

RESPONSE: Objectors have 14 days to comment after the report requesting additional information is issued and another 14 days after a compliance report is issued. Objectors have ample opportunity to submit supplemental information for the Council to consider.

N.J.A.C. 5:96-10.1(b)

COMMENT: The rule specifies considerably more monitoring tasks than currently exist for the municipality. Among these is a comparison of the growth share obligation to the obligation satisfied by the date of report. There must also be an evaluation of the results of affirmative marketing in the monitoring report. Will the municipal housing liaison understand all these facets of the monitoring procedure, or will additional training be required?

RESPONSE: Yes, the municipal housing liaison will understand all of the facets of monitoring because the municipal housing liaison will receive training annually. The commenter should note that Subchapter 17 of N.J.A.C. 5:96 details the requirements, approval and responsibilities of a municipal housing liaison.

N.J.A.C. 5:96-10.1(b)8

COMMENT: This provision requires an explanation of the status of the municipality's plan endorsement in the Biennial Plan Evaluation report. The purpose of the report is to verify that the construction/provision of affordable housing has been in proportion to actual residential and employment growth. The status of a municipality's plan endorsement has no relation to meeting its fair share obligation and is under the purview of the Office of Smart Growth not COAH.

RESPONSE: The rule will be amended in the near future to reflect the commenter's suggestion.

COMMENT: The State Planning rules, at N.J.A.C. 5:85-7.11(c), specifically indicate that "The State Planning Commission automatically endorses those portions of municipalities in the Pinelands area certified by the Pinelands Commission as conforming to the Pinelands Comprehensive Management Plan as long as the Pinelands Commission certification for that municipality remains in effect." As such, the Council should consider the status of the municipality's application for plan endorsement or master plan certification in accordance with the Comprehensive Management Plan.

RESPONSE: The rule has been clarified to require the status of a municipality's application for plan endorsement, "if applicable." The Council will also work with the Pinelands Commission as necessary.

N.J.A.C. 5:96-10.2

COMMENT: Clarification should be provided as to the precise timing of this notice as it is unclear when the seven days begin tolling (that is, when municipality receives report in mail, when Council resolution is adopted, when results are posted on the website. . .)

RESPONSE: The municipality must publish notice within seven days of the date of the biennial plan review report issued by COAH that the results of the Council's review are available for public inspection at the offices of the municipality.

COMMENT: This notice requirement puts an additional burden on the municipality. It would be more expedient and cost efficient for the results to be posted on COAH's website.

RESPONSE: The notice requirement is the same as that at N.J.A.C. 5:95-9.2. The Council believes the municipality must publish notice of the results of the Council's review. In addition, the Council will also post the results on its website.

N.J.A.C. 5:96-10.4

COMMENT: Per N.J.A.C. 5:96-10.4, biennial COAH review of monitoring is required and states that the number of units required is prorated if the shortage is 10 percent or greater. The municipality has 90 days to file a new housing plan. Affording only 90 days to formulate a new housing plan in this event is unrealistic given the notice requirements and need for scheduling of hearings on the new document. A minimum 150-day period is suggested.

RESPONSE: Council believes the proposed definitive timeline is realistic and achievable. A municipality will know well in advance whether or not it will have a shortfall in providing the requisite number of affordable housing units in proportion to actual development since it will be providing monitoring information once a year. As a municipality compiles annual monitoring information to report, it should begin to think about any amendment it believes should be made to comply with the Council's rules.

COMMENT: This is perhaps the place to comment on a possibly major practical problem. Since COAH undertook the present revision of its rules, the nation's housing market has gone into a serious downturn, which is driving the entire economy into recession. What happens if a plan is not carried out because builders simply do not wish to build (or cannot obtain financing)? This might not be a problem if a municipality's obligation were based entirely on future growth, and failure of future market rate construction to occur would mean that the obligation also would not occur. But what happens if a municipality has considerable obligations based on certificates of occupancy issued from 2004 to 2008 (as a result of plans approved earlier), plans to meet them through new construction in the next two years, but cannot carry out its plan because in the current housing market builders do not wish to, or are unable to obtain financing to, construct the planned units? Will the Council nevertheless penalize the municipality for this failure of the builders to deliver?

RESPONSE: Pursuant to N.J.A.C. 5:97-2.2(b) through (e), municipalities are required to build affordable housing in proportion to residential and non-residential certificates of occupancy that are issued between 2004 and 2018. To address the commenter's concern about downturns in the economy, the time period of need was extended to end in 2018 instead of 2014. This was done to more fully reflect a full economic cycle. The Council provides municipalities with a myriad of options to address the growth that has already occurred, including 100 percent municipal construction projects, market to affordable program which allows a buying down of existing market-rate units, reconstruction of existing units, municipally sponsored rental programs and accessory apartment programs. Further, many municipalities did capture affordable housing opportunities as part of approvals granted between 2004 and 2008. In addition, the commenter should note that N.J.A.C. 5:97-3.2(a)4 allows municipalities to phase the implementation of its plan over the certification period.

COMMENT: A municipality cannot always predict significant changes in land use. Affording only 90 days to formulate a new housing plan in this event is unrealistic given the notice requirements and need for scheduling of hearings on the new document.

RESPONSE: The Council believes the rules establish and enforce reasonable timetables for municipal compliance.

N.J.A.C. 5:96-11.3

COMMENT: The rule specifies "where applicable" monitoring information shall be provided to other agencies such as the N.J. Meadowlands Commission and Highlands Water Protection and Planning Council. It is not clear whether this is the responsibility of the municipal housing liaison or COAH. It would be appropriate for the various State agencies to coordinate directly with one another rather than assigning the responsibility to the municipality.

RESPONSE: The intent of the rule is that the municipal housing liaison would provide the monitoring information to the requisite agency.

N.J.A.C. 5:96-11.8(a) and (b)

COMMENT: COAH must eliminate the discretionary language in these sections. COAH must take an action.

RESPONSE: The Council believes that there may be unique circumstances for why a municipality did not submit its monitoring information in a form required by the Council; such a determination shall only be made after a municipality has had a chance to present its reasons to the Council. The Council will review the municipal compliance with its regulations and will take appropriate actions it deems necessary.

N.J.A.C. 5:96-11.8(b)2

COMMENT: The rule requires a municipality to appropriate funds from general revenue or adopt a resolution of intent to bond if there is a shortfall in funding for a mechanism for affordable housing. This violates the Fair Housing Act.

RESPONSE: N.J.A.C. 5:96-11.8(b)2 must be read in conjunction with N.J.A.C. 5:97-8.10(a)9. If a municipality is relying on housing trust fund monies to fund affordable housing mechanisms to address a portion of its obligation, the Council's rules require the municipality to provide the manner through which the municipality will address any shortfall if there are insufficient funds to implement mechanisms included in its certified plan. Many municipalities have indicated that they will either bond for it or appropriate monies from general revenue.

N.J.A.C. 5:96-12

COMMENT: Whenever COAH becomes aware that land, water, or sewer is a scarce resource, it should restrain the use of the resource. COAH should not wait for an objector to initiate the restraint.

RESPONSE: In *Hills Dev. Co. v. Bernards Tp. in Somerset Cty.* 103 N.J. 1 (1986), the Supreme Court upheld the validity of the Fair Housing Act, N.J.S.A. 52:27D-301 et seq.. The Court concluded that the Council has the power to require, as a condition of its exercise of jurisdiction on an application for substantive certification, that the applying municipality take appropriate measures to preserve "scarce resources," namely, those resources that will probably be essential to the satisfaction of its Mount Laurel obligation. *Id.* at 61. The Council intends to preserve scarce resources as necessary to ensure that the municipal affordable housing obligation can be addressed.

N.J.A.C. 5:96-12.1

COMMENT: The term scare resource implies that COAH will supersede municipal land use authority in violation of the Municipal Land Use Law.

RESPONSE: This rule is the same as that at N.J.A.C. 5:91-10.1 and remains unchanged. In *Hills Dev. Co. v. Bernards Tp. in Somerset Cty.*, 103 N.J. 1 (1986), the Supreme Court upheld the validity of the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. The Court concluded that the Council has the power to require, as a condition of its exercise of jurisdiction on an application for substantive certification, that the applying municipality take appropriate measures to preserve "scarce resources," namely, those resources that will probably be essential to the satisfaction of its Mount Laurel obligation. *Id.* at 61.

COMMENT: The Council should extend this provision to all governmental and quasi-governmental agencies. There should also be a consideration for land as a scarce resource. As such, open space acquisitions should be restrained until substantive certification is granted.

RESPONSE: The rule is intended to provide the Council with the necessary authority as stated within the FHA to ensure that a municipality fulfills its affordable housing obligation. With regard to the issue of scarce resources, in *Hills Dev. Co. v. Bernards Tp. in Somerset Cty.*, 103 N.J. 1 (1986), the Supreme Court upheld the validity of the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. The Court concluded that the Council has the power to require, as a condition of its exercise of jurisdiction on an application for substantive certification, that the applying municipality take appropriate measures to preserve "scarce resources," namely, those resources that will probably be essential to the satisfaction of its Mount Laurel obligation. *Id.* at 61. Therefore, the Council has the authority to issue scarce resource restraints as necessary to fulfill the affordable housing obligation.

N.J.A.C. 5:96-12.2

COMMENT: The rule allows COAH at any time, on its own determination or that of others, to deny certification without mediation and review. There should be a due process provision to allow the procedure to allow for a factual exchange, rather than an abrupt end.

RESPONSE: This rule was previously codified at N.J.A.C. 5:91-10.2 and remains unchanged. In such instances, the FHA provides municipalities with 60 days to submit an amended Housing Element and Fair Share Plan to COAH.

N.J.A.C. 5:96-13

COMMENT: COAH must schedule, hear and decide motions in a timely and even-handed manner. It cannot "table" motions made by objectors and accelerate motions made by municipalities. COAH must hear and decide motions within 90 days of a filed motion.

RESPONSE: The Council strives to hear motions as expeditiously as possible. COAH gives all motions equal consideration, regardless of the affiliation of the movant.

N.J.A.C. 5:96-13.1(b)

40 N.J.R. 3161(a)

COMMENT: The commenter agrees with the provision in N.J.A.C. 5:96-13.1(b) allowing parties to submit one hardcopy of its motion papers accompanied by an "electronic format." The commenter suggests that COAH amend this section to state: ". . .electronic format, including via electronic mail (email) directly to the Secretary of the Council on Affordable Housing." Indeed, the commenter recommends that COAH also allow a municipality to electronically file its Housing Element and Fair Share Plan followed by the submission of hard copies.

RESPONSE: The Council sees no need for an amendment to the proposed N.J.A.C. 5:96-13.1(b), because an electronic mail (email) is a form of an electronic format. In regard to the commenter's second recommendation, the commenter should note that the official petition date is the date that the hard copy is received at the COAH office.

N.J.A.C. 5:96-13.1(c)

COMMENT: The rule proposal states that COAH shall not accept motions for reconsideration. The commenter has reviewed COAH decisions that indicate a misunderstanding of the facts upon which the decision was based. COAH should be more concerned about making the right decision than limiting the decisions it makes.

RESPONSE: The commenter misinterprets the rule. The Council will reconsider a motion if new factual information is submitted. However, the Council does not believe it is a productive use of limited resources to revisit a decision when no new facts have been presented.

N.J.A.C. 5:96-13.1(d)

COMMENT: The rule proposal states that COAH shall not accept a motion if an objection is filed by the same party on substantially the same manner. This limitation is not productive. If, for example, an objector is able to show that there is a scarce resource, it would be totally appropriate for the objector to file an objection based on the inefficient use of the resource and, at the same time, file a motion to restrain the resource.

RESPONSE: The commenter should note that, pursuant to N.J.A.C. 5:96-8.3(d), if an issue arises during the course of mediation, the Council will hear it at that time and mediation will resume immediately after the Council's decision. The intent of the rule is to direct objections to the mediation process for resolution, rather than allowing a dual track to occur before the Council and in mediation at the same time. This holds true for a municipality as well. Neither would the Council permit municipalities to file a petition or re-petition and a concurrent motion that addresses the same issue in the petition to prevent a dual tack occurring as that would be an inefficient use of the Council's resources. In the commenter's example, the Council would not consider this to be the same matter. The party would not be prohibited from submitting a motion for a scarce resource restraint.

N.J.A.C. 5:96-14.1(b)

COMMENT: COAH should eliminate the ability to avoid a major amendment if the change involves 10 percent or less of the municipal fair share. Municipal plans that receive substantive certification have gone through a very public process. It is important that all changes that involve a change in site, increase in density, a change in zoning that results in a change in housing type or a fundamental change in approach be properly vetted prior to COAH approval.

RESPONSE: The commenter should be aware that an amendment to the Housing Element and Fair Share Plan must be adopted in accordance with the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., (MLUL) prior to submission to the Council. All affected property owners will be notified in accordance with the notification requirements of the MLUL. In addition, the motion must be served to all the parties on the municipal service list which would include any property owners in the plan. Any party on the service list will have 20 days to submit a written response on the motion. The Council believes that there is sufficient public notice and participation for a minor technical amendment. In addition, a municipality may not amend its zoning ordinance to remove the affordable housing requirement for sites that were subject to an agreement pursuant to the Council's mediation process or part of a

negotiated settlement in court and/or sites with filed development applications without consent of the property owner.

N.J.A.C. 5:96-14.2

COMMENT: The Council should require municipalities to accept operating manuals prepared by an approved, project based, administrative agent provided that operating manual is approved by the Council.

RESPONSE: The Council appreciates the commenter's suggestion and will propose rule amendments in the future.

N.J.A.C. 5:96-15.2

COMMENT: The Council should include waivers which further incentivize the development of affordable housing. The rule should specifically allow for waivers for projects meeting the requirements of other State or Federally funding programs which will require deed restrictions for affordable housing.

RESPONSE: This issue is currently addressed in the Uniform Housing Affordability Controls (UHAC). The Council will address consistency with other State or Federal funding programs in a future rule amendment.

COMMENT: Based on the use of the word "and" instead of "or," it appears that a waiver request must be justified by all of the criteria for a waiver. COAH must clarify its intent.

RESPONSE: The rule will be revised in the near future to replace "and" with "or."

N.J.A.C. 5:96-15.2(d)

COMMENT: COAH should delete "a mix of housing options" from its waiver criteria. If COAH decides that this should remain as a basis for a waiver, COAH must provide examples of how providing a mix of housing options justifies a waiver from its rules.

RESPONSE: The intent of this provision is to ensure that a municipality is providing a mix of housing types - for example, family units as well as, group homes and age-restricted units.

N.J.A.C. 5:96-16.2

COMMENT: The Council should allow the prior cycle plans to be bifurcated from the current process to allow projects planned to address those prior obligations to proceed; and the rules should also allow for previously committed RCAs to be transferred.

RESPONSE: The rules do not prevent mechanisms included in a previously certified plan from going forward or the continuation of a previously COAH approved RCA. The municipality need only include the prior mechanisms in its revised Housing Element and Fair Share Plan.

COMMENT: Municipalities in Planning Areas 3, 4, 4B, 5 or 5B which have affordable housing that are not within a designated center or an existing sewer service area have the burden of demonstrating such strategies are consistent with "... sound planning principles and the goals, policies and objectives of the State Development and Redevelopment Plan." If COAH's default position is that all affordable housing in the above cited planning areas properly belongs within centers or areas already served by sanitary sewerage facilities, common sense demands that the deadlines be extended. For those municipalities that must establish a new center or attempt to extend water and sewer infrastructure, it is now required that they do so through the Plan Endorsement process. For a municipality to adequately zone for such growth consistent with the State Development and Redevelopment Plan (SDRP), it may be necessary to create one or more centers per the site suitability criteria set forth in N.J.A.C. 5:97-3.13. According to SDRP rules, "center designation" is time-consuming and an expensive process. The municipality may have to consider the creation of

necessary water and sewer infrastructure, which would require time and expense in planning with the NJDEP. The proper location of housing may be best accommodated through a Transfer of Development Rights program per the SDRP - Plan Endorsement guidelines, all of which requires time and funding to plan properly. COAH should extend the deadlines to petition or file an amended Housing Element and Fair Share Plan. In order to meet the proposed filing deadlines, and address the requirements of N.J.A.C. 5:97-3.2, municipalities will be required to amend Master Plans, prepare ordinances, and for some municipalities, enter into the Plan Endorsement process. There is simply not enough time to satisfy the new deadlines. These processes will require a significant amount of financial resources and investment in time. Public input and comment is also a significant portion of the required endeavors and given the time frame identified will not be possible in any meaningful way. For example, the Plan Endorsement Guidelines requires the establishment of an Advisory Committee for the preparation of a Municipal Self-Assessment for petitioning, to facilitate the public visioning sessions and related work. Amendments to Water Quality and Wastewater Management plans will be necessary in many communities; procedures that will involve County planning agencies and public hearings. It is simply not possible to create a rational 10-year growth plan, one which will transform the character of many municipalities, in such a short timeframe. At least one more year should be provided in the rule for municipalities to repetition for third Round substantive certification.

RESPONSE: The Council will propose an amendment in the near future to change the deadline to December 31, 2008 for all municipalities to submit petitions. The Council recognizes that municipalities seeking to obtain plan endorsement or extend water and sewer infrastructure cannot realistically do so by December 31, 2008. Accordingly, the Council's rule at N.J.A.C. 5:97-3.2(a)8 requires a demonstration of "existing or planned water and sewer capacity sufficient to accommodate all proposed mechanisms." Further, the Council will amend its rules in the near future to permit municipalities participating in the third round to seek a durational adjustment if the proposed site does not have sewer and water infrastructure. Similarly, any requirement for plan endorsement, if deemed necessary, would be made a condition of substantive certification and ongoing monitoring, not an upfront petition requirement.

COMMENT: It is the commenter's position that this rule should be revised to require that municipalities are not required to submit third round plans until all of the litigation that is certain to result once the rules become effective on June 2, 2008 is resolved. There has been much commentary as to the fact that the League of Municipalities, the builders and the affordable housing advocates all have significant concerns as to the viability of the new rules and whether they will stand up to the Court's scrutiny. It is unfair to force municipalities again to expend financial resources and municipal staff and officials to devise new plans while litigation is pending with the possibility of the Court invalidating all or part of the rules yet again.

RESPONSE: The Council believes that the re-proposed methodology is entirely consistent with the requirements of the FHA and the 2007 decision, *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing*, 390 N.J. Super. 1 (App. Div. 2007), *certif. denied*, 192 N.J. 71 (2007). The Council is required to adopt all rules necessary for effectively carrying out the provisions and purposes of the Fair Housing Act (FHA). N.J.S.A. 52:27D-307.5.

COMMENT: Time constraints required in the rules, costs associated with compliance and public participation would prohibit the enactment of the zoning changes prior to the COAH-imposed deadline. COAH should extend the deadlines to petition or file an amended Housing Element and Fair Share Plan. In order to meet the proposed filing deadlines and address the requirements of N.J.A.C. 5:97-3.2, municipalities will be required to amend Master Plans, prepare ordinances, and for some municipalities, enter into the Plan Endorsement process. There is simply not enough time to satisfy the new deadlines. These processes will require a significant amount of financial resources and investment in time. To remain under the jurisdiction of COAH, a municipality will be required to re-petition with an amended Third Round Housing Element and Fair Share Plan by November or December, 2008. Assuming the rules become effective June 2008, this will be an extremely tight deadline for any municipality to analyze the regulations, comprehensively plan for a community altering surge of growth, conduct public meetings, and present to the county planning board for adoption with endorsement by the governing body. COAH should extend the deadlines and reduce the submission requirements for re-petitioning to permit sufficient deliberation, public participation and policy

development before an action plan must be set in place. There is no time for a "vision" process that will garner public input to help establish the community objectives for where development should and should not occur. For example, the Plan Endorsement Guidelines require the establishment of an Advisory Committee for the preparation of a Municipal Self-Assessment for petitioning. Amendments to Water Quality and Wastewater Management plans will be necessary in many communities with procedures that will involve county planning agencies and public hearings. It is simply not possible to create a rational 10-year growth plan, one which will transform the character of many municipalities, in such a short timeframe. Further, as this is a State mandate, the State should fund the costs associated with this reexamination process.

RESPONSE: The commenter is incorrect in assuming that a municipality must adopt zoning changes prior to or simultaneous with the adoption of a municipal Housing Element and Fair Share Plan. Pursuant N.J.S.A. 52:27D-314 and N.J.A.C. 5:96-6.3(e), municipalities have 45 days from the grant of substantive certification to adopt all implementing ordinances, which includes zoning ordinances. With regard to the issue of a State mandate, the commenter should note that the FHA establishes COAH as a voluntary process for municipalities. Municipalities that participate in the COAH process may impose development fees on market rate development to help defray the costs of submitting a Fair Share Plan.

COMMENT: COAH should either provide additional time for Highlands municipalities to re-petition for third round substantive certification or identify an alternative provisional standard to COAH's projected growth and related affordable housing obligation. The provisional standard would be for a Fair Share Plan that conforms to the actual growth in the municipality, not COAH's projected growth, as of the date of re-petition. In the absence of rules for the COAH/Highlands cooperative approach, or any type of memorandum of understanding between the two agencies, Highlands municipalities will be compelled to make land use and zoning decisions in a hurried fashion to satisfy COAH's deadlines, which may be inconsistent with the Regional Master Plan (RMP). Requiring municipalities to repetition for third round substantive certification without such an agreement will likely compromise sound and coordinated planning pursuant to the policies and objectives of the Highlands RMP.

RESPONSE: The Council notes that, as of the date of this rule adoption, the Highlands RMP is in draft form and has not been adopted. Upon adoption of the Highlands RMP, the Council will consider its impacts. COAH intends to work cooperatively with the Highlands Council to enter into a Memorandum of Understanding in the near future.

COMMENT: To remain under the jurisdiction of COAH, municipalities will be required to re-petition with an amended Third Round Housing Element and Fair Share Plan by December 2008. This will be an extremely tight deadline for municipalities to analyze the regulations, comprehensively plan for a community altering surge of growth, conduct public meetings, and have a revised Housing Plan adopted by the planning board and endorsed by the governing body. The rules should be modified to allow substantive certification for a Housing Element /Fair Share Plan which addresses only that portion of the growth share obligation (as modified) ". . . up to the first plan review. . ." as stated in N.J.A.C. 5:97-3.2(a)4. Thus, rather than beginning the cycle of speculative investment in these lands, zoning should cover a shorter forecast period, targeted to an initial growth forecast two-to-three years out which can be supplemented as necessary in response to the monitoring process.

RESPONSE: To allow more time for planning, the rules will be amended in the future to require all municipalities with pending third round petitions to repetition with an amended third round Housing Element and Fair Share Plan on or before December 31, 2008. The commenter should note that the rules include an option for a municipality to phase certain components of its plan based on the feasibility of the proposed mechanisms. However, to permit zoning to be phased in would not create a realistic opportunity for affordable housing to be constructed and would be inconsistent with the FHA, which requires the municipality adopt its zoning ordinance within 45 days of the grant of substantive certification. It is the Council's intent for the rules to provide a level of flexibility so that a municipality can comply with the prescribed timelines and deadlines.

N.J.A.C. 5:96-16.2(a)

COMMENT: The deadlines provided in N.J.A.C. 5:95-16.2(a) should be amended to provide an extension for any municipalities seeking an adjustment to its growth share projections.

RESPONSE: The Council does not believe it would be appropriate to set up different deadlines for municipalities seeking an adjustment to its growth projections than for other municipalities because it would create an unnecessary delay in the Council's administrative process. The commenter should note that the Council will propose an amendment in the near future to change the deadline to December 31, 2008 for all municipalities to submit petitions.

N.J.A.C. 5:96-18.1(b)

COMMENT: For projects developed under the Internal Revenue Service (IRS) Code Section 42 (Low Income Housing Tax Credit), projects receiving HOME funds and other HUD funded projects (202, 811, HOPE VI, etc.), if the project owner or manager has met the criteria for a private entity to be approved as an administrative agent under N.J.A.C. 5:96-18.2, then they shall be permitted to act as the administrative agent for the project. There shall be no cost imposed by the municipality to the project.

RESPONSE: The Council appreciates the commenter's suggestion and will propose rule amendments in the future.

N.J.A.C. 5:96-20

COMMENT: The only mention of funding assistance is "subject to availability of funds COAH may pay for one municipal employee per year to receive the mandatory training." This is in direct contrast to requiring a municipality to appropriate general revenue and bond for the affordable housing obligation. It also means that the cost burden of training the employees is more than likely to factor into the municipal budget as an expenditure. This provision is also concerning because the amount of training required may increase, thereby generating even more costs to the municipality both in terms of tuition and lost time for the municipal employee's other functions due to the time required for training.

RESPONSE: The Council requires the municipality to identify one person to serve as the municipal housing liaison. COAH will pay for this employee to receive training. Therefore, training costs need not be factored in as a municipal expenditure. Furthermore, the training requirements are clearly described in N.J.A.C. 5:96-20.

Summary of Agency-Initiated Changes:

N.J.A.C. 5:95-1.1 has amended to reflect that the Council is no longer repealing N.J.A.C. 5:95, effective December 20, 2004, as three municipalities, Buena Borough in Atlantic County, Washington Township in Morris County, and White Township in Warren County, were previously granted substantive certification by the Council under these rules, and said certifications were upheld by the Appellate Division in *In re Adoption of N.J.A.C. 5:94 and N.J.A.C. 5:95 by the Council on Affordable Housing*, 390 N.J. Super. 1 (App. Div. 2007), *certif. denied*, 192 N.J. 71 (2007).

Proposed new N.J.A.C. 5:95 has been recodified as N.J.A.C. 5:96. All cross-references have been corrected to reflect the recodification of N.J.A.C. 5:95 as 5:96 and N.J.A.C. 5:94 (the Council's Substantive Rules, adopted concurrently with the Procedural Rules) as 5:97.

All text relating to the effective date of N.J.A.C. 5:96 have been updated with the actual date.

Federal Standards Statement

No Federal standards analysis is required because these rules are not being adopted in order to implement, comply with, or participate in any program established under Federal law or under a State law that incorporates or refers to Federal law, standards, or requirements.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

CHAPTER 95

PROCEDURAL RULES OF THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING FOR THE PERIOD BEGINNING ON DECEMBER 20, 2004

SUBCHAPTER 1. GENERAL PROVISIONS

5:95-1.1 Short title; purpose; scope

(a) (No change.)

(b) The purpose of this chapter is to establish procedures to be used by ***[municipalities]******Buena Borough in Atlantic County, Washington Township in Morris County, and White Township in Warren County, for which substantive certification was granted by the Council prior to January 25, 2007 and upheld in *In re Adoption of N.J.A.C. 5:94 and 5:95 by the Council on Affordable Housing*, 390 N.J. Super. 1, *certif. denied*, 192 N.J. 71 (2007),*** in addressing their constitutional obligation to provide a fair share of affordable housing for low- and moderate-income households pursuant to N.J.S.A. 52:27D-301 et seq.

(c) Municipalities ***[filing or petitioning for substantive certification prior to December 20, 2004 shall be governed by the provisions of N.J.A.C. 5:91. Municipalities filing or petitioning on or after December 20, 2004]*** ***that did not receive third round substantive certification prior to January 25, 2007*** shall be governed by the provisions of ***[this chapter]*** *** N.J.A.C. 5:96***.

(d) (No change.)

CHAPTER ***[95]*** ***96***

PROCEDURAL RULES OF THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING FOR THE PERIOD BEGINNING ON ***[(THE EFFECTIVE DATE OF THIS CHAPTER)]*** ***JUNE 2, 2008***

SUBCHAPTER 1. GENERAL PROVISIONS

[5:95]***5:96*-1.1** Short title; purpose; scope

(a) The provisions of this chapter shall be known as the "Procedural Rules of the New Jersey Council on Affordable Housing for the Period Beginning ***[(the Effective Date of this Chapter)]*** ***June 2, 2008***."

(b) This chapter establishes procedures to be used by municipalities in addressing their constitutional obligation to provide a fair share of affordable housing for low- and moderate-income households pursuant to N.J.S.A. 52:27D-301 et seq.

(c) Municipalities filing or petitioning the Council on or after December 20, 2004 shall be governed by the provisions of this chapter.

(d) If any part of this chapter shall be held invalid, the holding shall not affect the validity of remaining parts of these rules. If a part of these rules is held invalid in one or more of its applications, the rules shall remain in effect in all valid applications that are severable from the invalid application.

***[5:95]**5:96*-1.2 Jurisdiction**

(a) A municipality shall fall within the jurisdiction of the Council if:

1. The municipality has filed a Housing Element and Fair Share Plan and petitioned for substantive certification simultaneously or within two years of such filing;
2. The municipality has filed a Housing Element and Fair Share Plan and is the defendant to an exclusionary zoning suit within two years of such filing;
3. The municipality has been granted substantive certification pursuant to N.J.A.C. *[5:95]**5:96*-6.3; or
4. A court transfers jurisdiction of the case to the Council pursuant to N.J.A.C. *[5:95]**5:96*-2.3.

(b) If a municipality fails to petition for substantive certification within two years after filing a Housing Element and Fair Share Plan in accordance with N.J.S.A. 52:27D-313, the filing shall automatically expire.

***[5:95]**5:96*-1.3 Definitions**

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Act" means the Fair Housing Act of 1985, P.L. 1985, c. 222 (N.J.S.A. 52:27D-301 et seq.).

"Administrative agent" means the entity responsible for the administration of affordable units in accordance with this chapter, N.J.A.C. *[5:94]**5:97* and UHAC.

"Affordable housing program(s)" means any mechanism in a municipal Fair Share Plan proposed or implemented to address a municipality's fair share obligation.

"Affordable unit" means a housing unit proposed or created pursuant to the Act, credited pursuant to N.J.A.C. *[5:94]**5:97*, and/or funded through an affordable housing trust fund.

"Agency" means the New Jersey Housing and Mortgage Finance Agency established by P.L. 1983, c. 530 (N.J.S.A. 55:14K-1 et seq.).

"Amendment" means the municipal submission of a revision to a certified Housing Element and Fair Share Plan that has been adopted by the planning board and endorsed by the governing body that requires a change in site, substantial change in density, a change in other zoning requirements that result in a change of housing type on a specific site, or a fundamental change in approach to the municipality's low- and moderate-income housing obligation.

"Controls on Affordability" means any rule governing affordable units as found in N.J.A.C. 5:80-26.

"Council" means the New Jersey Council on Affordable Housing established under the Act which has primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in the State.

"Days" means calendar days.

"Fair Share Plan" means the plan that describes the mechanisms, strategies and the funding sources, if applicable, by

which a municipality proposes to address its affordable housing obligation as established in the Housing Element, includes the draft ordinances necessary to implement that plan, and addresses the requirements of N.J.A.C.

*[5:94]**5:97*-3.

"Filed Housing Element and Fair Share Plan" means the municipal submission of a Housing Element and Fair Share Plan accompanied by a duly adopted resolution from the governing body endorsing the Housing Element and the Fair Share Plan adopted by the planning board, but not necessarily petitioning for Council review or certification of the plan pursuant to N.J.A.C. *[5:95]**5:96*-3.

"Housing Element" means the portion of a municipality's master plan, required by the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-28b(3) and the Act, that includes all information required by N.J.A.C. *[5:94]**5:97*-2.3 and establishes the municipality's fair share obligation.

"Housing region" means a geographic area, determined by the Council, of no less than two and no more than four contiguous, whole counties that exhibits significant social, economic and income similarities, and which constitutes to the greatest extent practicable, a Primary Metropolitan Statistical Area (PMSA) as last defined by the United States Census Bureau.

"Mediation" means the process established by the Act whereby objectors to a municipality's petition for substantive certification and other participants meet with the municipality under the direction of a Council-appointed mediator to attempt to resolve disputes.

"Minor technical amendment" means a minor revision to a certified municipal Housing Element and/or Fair Share Plan that has been adopted by the planning board and endorsed by the governing body that is not considered an amendment pursuant to N.J.A.C. *[5:95]**5:96*-14.1(b).

"Motion" means a written application requesting the Council to make a specified ruling or order pursuant to N.J.A.C. *[5:95]**5:96*-13.

"Municipal housing liaison" means an appointed municipal employee who is responsible for oversight and/or administration of the affordable units created within the municipality.

"Objector" means a person who files objections to a municipal Housing Element and Fair Share Plan in accordance with N.J.A.C. *[5:95]**5:96*-4.1.

"OAL" means the Office of Administrative Law.

"Participant to mediation" means any person the mediator deems necessary to conduct mediation and resolve any objections to a municipality's petition for substantive certification. The Council, or its designee conducting mediation, shall determine the extent to which a participant may take part in mediation.

"Petition for Substantive Certification" means a request made by municipal resolution filed in accordance with this chapter, seeking a determination through the Council's review process as to whether the municipal Housing Element and Fair Share Plan is consistent with the Act and compliant with rules promulgated by the Council. When used in this chapter, petition shall also mean re-petition.

"RCA administrator" means an appointed municipal employee who is responsible for oversight and/or administration of affordable units within the municipality that were funded through Regional Contribution Agreements.

"RCA Project Plan" means a completed application, submitted by the receiving municipality in an RCA, delineating the

manner in which the receiving municipality shall create or rehabilitate low- and moderate-income housing.

"Receiving municipality" means, for the purposes of an RCA, a municipality that agrees to assume a portion of another municipality's fair share obligation.

"Regional Contribution Agreement (RCA)" means a contractual agreement, pursuant to the Act, voluntarily entered into by two municipalities to transfer a portion of one municipality's fair share obligation to another municipality within the same housing region.

"Re-petition" means the municipal submission of a revision to a petition that has been adopted by the planning board and endorsed by the governing body, but has not yet received substantive certification.

"Sending municipality" means a municipality that transfers a portion of its fair share obligation to another willing municipality as part of an RCA.

"Service list" means a list maintained by the Council pursuant to N.J.A.C. *[5:95]**5:96-3.7*.

"Substantive certification" means a determination by the Council approving a municipality's Housing Element and Fair Share Plan in accordance with the provisions of the Act, this chapter, and N.J.A.C. *[5:94]**5:97*. A grant of substantive certification may run for a period of 10 years beginning on the date that a municipality files its Housing Element and Fair Share Plan with the Council in accordance with N.J.S.A. 52:27D-313, but shall not extend beyond December 31, 2019.

"UHAC" means the Uniform Housing Affordability Controls set forth in N.J.A.C. 5:80-26.

SUBCHAPTER 2. FILING A HOUSING ELEMENT AND FAIR SHARE PLAN

*[5:95]**5:96*-2.1 Filing

A municipality may file its Housing Element and Fair Share Plan with the Council at any time pursuant to the Act.

*[5:95]**5:96*-2.2 Filing requirements

(a) A municipal Housing Element and Fair Share Plan that is filed with the Council shall be either hand delivered or mailed and shall contain the following information in a hard copy and electronic format (if possible), in a form provided by the Council:

1. A copy of the adopted Housing Element in conformance with N.J.A.C. *[5:94]**5:97*-2.3(a) and Fair Share Plan with all necessary information and documentation as required by the Council in conformance with N.J.A.C.

*[5:94]**5:97*-3.2(a);

2. A certified copy of the resolution of the municipal planning board adopting the Housing Element and Fair Share Plan as part of the municipality's master plan pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.;

3. A certified copy of the resolution of the governing body of the municipality endorsing the Housing Element and Fair Share Plan; and

4. A service list pursuant to N.J.A.C. *[5:95]**5:96*-3.7.

(b) The Council's Executive Director shall notify the municipality in writing of any deficiencies in its filing as required

by (a) above within 45 days of issuance. If there are no deficiencies, the notification letter will acknowledge receipt of the Housing Element and Fair Share Plan and advise the municipality that it has two years to petition.

(c) A municipality receiving written notice of any deficiencies in its filing shall respond to the Council within 45 days of the date of such notice. Failure of a municipality to correct all deficiencies within 45 days shall automatically result in the rejection of the municipality's filing and dismissal from the Council's jurisdiction.

(d) A municipality may revise and re-file before submitting a petition, but such re-filing shall not extend the period of jurisdiction described in N.J.A.C. *[5:95]**5:96*-1.2 beyond two years from the date of the initial filing.

(e) Notwithstanding any cited deficiencies, the date of initial filing starts the maximum 10-year period during which the Council's grant of substantive certification shall apply or the period of the benefits outlined in N.J.A.C. *[5:95]**5:96*-3.8.

(f) Once a filing is deemed complete, the Council's Executive Director may review and approve municipal housing liaisons, administrative agents, RCA administrators, affirmative marketing plans, and operating manuals.

*[5:95]**5:96*-2.3 Transferred cases

When a case is transferred to the Council by court order pursuant to N.J.S.A. 52:27D-316, the municipality shall submit an adopted Housing Element and Fair Share Plan to the Council within 90 days from the date of transfer. The municipal plan shall conform to the petitioning requirements of N.J.A.C. *[5:95]**5:96*-3.

SUBCHAPTER 3. PETITION FOR SUBSTANTIVE CERTIFICATION

*[5:95]**5:96*-3.1 Petition

A municipality may petition the Council for substantive certification within two years from the date of filing its Housing Element and Fair Share Plan, or may file and petition the Council simultaneously.

*[5:95]**5:96*-3.2 Petition requirements

(a) A petition for substantive certification shall be in the form of a filing pursuant to N.J.A.C. *[5:95]**5:96*-2.2(a) and shall also include a duly adopted resolution from the governing body requesting Council review and certification of the Housing Element and Fair Share Plan.

(b) A petition shall be reviewed and accepted according to the requirements in N.J.A.C. *[5:95]**5:96*-2.2.

(c) Once a petition is deemed complete, and after the public review period pursuant to N.J.A.C. *[5:95]**5:96*-3.6, the Council may review and approve development fee ordinances and spending plans.

*[5:95]**5:96*-3.3 Action equivalent to a petition for substantive certification

A municipality engaged in an exclusionary zoning lawsuit whose Housing Element and Fair Share Plan has been transferred to the Council by the courts pursuant to N.J.S.A. 52:27D-316, shall be deemed to have petitioned for substantive certification when the Council accepts the municipality's adopted Housing Element and Fair Share Plan as required pursuant to N.J.A.C. *[5:95]**5:96*-2.2.

*[5:95]**5:96*-3.4 Re-petition requirements

(a) A municipality that has petitioned the Council may re-petition with a revised Housing Element and Fair Share Plan in accordance with N.J.A.C. *[5:95]**5:96*-3.2 prior to the grant of substantive certification. A municipality shall re-petition when the revisions to its plan include a change in site, substantial change in density, a change in any other zoning requirement that results in a change of housing type on a specific site or a fundamental change in approach to its fair share obligation. However, if the revision alters the plan to address the municipality's fair share obligation by ten percent or less, it may be considered a minor revision pursuant to (b) below.

(b) A municipality seeking a minor revision to its adopted Housing Element and Fair Share Plan that does not substantially alter the terms of its municipally adopted Housing Element and Fair Share Plan pursuant to (a) above, may do so by motion pursuant to N.J.A.C. *[5:95]**5:96*-14.3. Examples include, but are not limited to, changing the number of units in an existing mechanism, adding a program that is not site specific, or altering the plan to address the municipality's fair share obligation by 10 percent or less.

(c) A municipality shall not petition with a revised Housing Element and Fair Share Plan more than three times subsequent to *[(the effective date of this chapter)]* ***June 2, 2008***, without prior authorization of the Council.

***[5:95]**5:96*-3.5 Notice**

(a) In order to provide the general public with an opportunity to review the municipal Housing Element and Fair Share Plan and to submit objections or comments, when a municipality petitions for substantive certification or is deemed to have petitioned pursuant to N.J.A.C. *[5:95]**5:96*-3.3, it shall publish notice of its petition. Within seven days of the issuance of the notification letter from the Council's Executive Director pursuant to N.J.A.C. *[5:95]**5:96*-2.2(b) indicating the submission is complete, notice shall be published in a newspaper of general circulation within the municipality and county. The public notice shall be in the legal newspaper of the municipality as well as one that is widely circulated within the county if the legal newspaper is not widely circulated within the county. If the Council's Executive Director determines that notice was not published in a newspaper of general circulation, the municipality shall be required to re-publish in another appropriate newspaper.

(b) Notice of a petition for substantive certification shall be provided in the following format:

NOTICE OF PETITION FOR SUBSTANTIVE CERTIFICATION

NOTICE is hereby given that (MUNICIPALITY) has petitioned the New Jersey Council on Affordable Housing for Substantive Certification of its Housing Element and Fair Share Plan pursuant to N.J.S.A. 52:27D-301 et seq. and N.J.A.C. *[5:95]**5:96*-3.1 et seq. A copy of the adopted Housing Element and Fair Share Plan and supporting documentation is available for public inspection at the office of the (Municipal Clerk, etc.), Municipal Building, located at (street address), during the hours of _____. Comments or objections to said petition for Substantive Certification shall be filed with the New Jersey Council on Affordable Housing, 101 South Broad Street, PO Box 813, Trenton, New Jersey 08625-0813 and with the municipal clerk by (DATE) which is within 45 days of publication of this notice.

Municipal Clerk

(c) A municipality that chooses to revise its plan and re-petition or is required to re-petition with a revised plan for substantive certification shall provide notice in the following format:

NOTICE OF RE-PETITION FOR SUBSTANTIVE CERTIFICATION

NOTICE is hereby given that (MUNICIPALITY) has re-petitioned the New Jersey Council on Affordable Housing for

Substantive Certification of its Housing Element and Fair Share Plan pursuant to N.J.S.A. 52:27D-301 et seq. and N.J.A.C. *[5:95]**5:96*-3.4. The (MUNICIPALITY) Planning Board, subsequent to public hearing, adopted a revision to its Housing Element and Fair Share Plan on (date). The adopted plan is a revision of a previously adopted Housing Element and Fair Share Plan for which the (Township/Borough/Town/City) had initially petitioned the Council on Affordable Housing for substantive certification on (date).

A copy of the revised and adopted Housing Element and Fair Share Plan and supporting documentation is available for public inspection at the office of the (Municipal Clerk, etc.), Municipal Building, located at (street address), during the hours of _____. Comments or objections to said re-petition shall be filed with the Council on Affordable Housing, 101 South Broad Street, PO Box 813, Trenton, New Jersey 08625-0813 and with the municipal clerk by (DATE) which is within 45 days of publication of this notice.

Municipal Clerk

(d) An updated list of all petitions for substantive certification received by the Council shall be published monthly on its website.

*[5:95]**5:96*-3.6 Public review

A municipality that has petitioned for substantive certification with the Council shall make copies of the Housing Element and Fair Share Plan and all supporting documentation available for public inspection within the municipality. The Housing Element and Fair Share Plan shall be available for inspection during regular business hours for a period of 45 days beginning on the date of publication of the notice of petition for substantive certification pursuant to N.J.A.C. *[5:95]**5:96*-3.5.

*[5:95]**5:96*-3.7 Service list

(a) At the time it files or petitions for substantive certification a municipality shall provide the Council with a service list that includes the following information:

1. The current names and addresses of owners of sites identified by block and lot that were included in previously certified or court settled plans that were zoned for low- and moderate-income housing and/or were to pay a negotiated fee(s). The owners of sites that have been completely developed shall not be included on the service list;
2. The names and addresses of owners of all new or additional sites included in the Fair Share Plan. The sites shall be identified by block and lot and paired with the names and addresses of the respective owners;
3. The names and addresses of all municipal employees or designees that the municipality would like notified of all correspondence relating to the filing or petition; and
4. The names and addresses of relevant county, regional and/or State entities.

(b) The owners of sites designated in the municipal submission shall be given written notice by the Council's Executive Director of the submission of a petition. Such property owners may participate in mediation and shall have the rights granted to objectors of the municipal submission.

(c) Any interested person may submit a written request to the Council to be included on the service list or deleted from a service list for one or more municipalities.

*[5:95]**5:96*-3.8 Builder's remedy litigation

(a) When a municipality falls within the jurisdiction of the Council pursuant to N.J.A.C. *[5:95]**5:96*-1.2(a)1, 2 and 3, the municipality shall not be subject to a builder's remedy, unless the municipality's petition is dismissed or substantive certification is revoked by the Council.

(b) If an exclusionary zoning lawsuit is filed either prior to the filing of a Housing Element and Fair Share Plan or after the filing of a Housing Element and Fair Share Plan where a petition for substantive certification was not submitted within two years of the filing, and the case is transferred to the Council by the court, the Council shall require the municipality to include the contested site as a component of its plan provided the site is suitable pursuant to N.J.A.C. *[5:94]**5:97*-3.13.

SUBCHAPTER 4. OBJECTIONS TO A PROPOSED HOUSING ELEMENT AND FAIR SHARE PLAN

*[5:95]**5:96*-4.1 Objections

(a) Within 45 days of publication of the notice of a municipality's petition for substantive certification, any person may file objections to a municipality's Housing Element and Fair Share Plan. Objections shall be filed with the Council and the municipality. The Council shall not consider any objection regarding its rules and regulations as a valid objection. An objection shall be in a form as may be determined by the Council's Executive Director and shall include, at a minimum, the following:

1. A clear and complete statement as to each aspect of the municipality's Housing Element and Fair Share Plan to which an objection is made;
2. An explanation of the basis for each objection including, where appropriate, citations to expert reports, studies or other data relied upon to support each objection;
3. Copies of all referenced expert reports, studies or other data relied upon by the objector;
4. Proposed modifications, changes or other measures which the objector contends will resolve the objection and an explanation of how the objector's proposals are consistent with the Council's criteria and guidelines;
5. A statement documenting the objector's prior efforts at premediation, participation in conferences or public hearings and a summary of the results of any such efforts; and
6. Identification and a description of any site proposed by the objector, including a history of development applications (if any), for inclusion in the Housing Element and Fair Share Plan and a demonstration that the site is suitable in accordance with N.J.A.C. *[5:94]**5:97*-3.13.

*[5:95]**5:96*-4.2 Review of objections

(a) The Council's Executive Director shall review objections subject to the requirements of N.J.A.C. *[5:95]**5:96*-4.1 to determine completeness and validity. The Executive Director shall notify the objector who has filed an objection and the service list that the objection is complete and valid and that the objector is permitted to participate in the Council's administrative process beginning with mediation as set forth in N.J.A.C. *[5:95]**5:96*-8.

(b) Objections that are determined to be incomplete or invalid shall be returned to the objector who shall have 14 days to correct deficiencies and resubmit them in a manner conforming to N.J.A.C. *[5:95]**5:96*-4.1. If the objections are

not resubmitted within the 14 days, the Council's Executive Director shall consider the objections to be withdrawn.

(c) The municipality shall submit a written response to all items delineated in the objector's objection. Such written response shall be submitted to the Council and service list within 20 days of the notification letter issued in accordance with (a) above.

(d) Each objection and municipal response to same shall be reviewed and summarized in a premediation report that is issued by the Council's Executive Director pursuant to N.J.A.C. *[5:95]**5:96*-7.2(a).

SUBCHAPTER 5. REVIEW OF DEVELOPMENT FEE ORDINANCES AND SPENDING PLANS FOR AFFORDABLE HOUSING TRUST FUNDS

*[5:95]**5:96*-5.1 Development fee ordinance review

(a) Pursuant to N.J.A.C. *[5:94]**5:97*-8.3, a municipality that seeks to impose mandatory development fees shall submit its proposed development fee ordinance to the Council for review and approval.

(b) The Council shall review a development fee ordinance once the municipality has submitted:

1. A copy of an adopted Housing Element that complies with the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.;

2. A copy of the proposed ordinance designed to collect development fees, which is consistent with N.J.A.C. *[5:94]**5:97*-8.3;

3. A description of any changes to the municipal zoning ordinance during the previous two years;

4. A request in the form of a resolution by the governing body for the Council to review and approve the development fee ordinance, unless the development fee ordinance was submitted as part of a petition pursuant to N.J.A.C. *[5:95]**5:96*-3; and

5. If applicable, a copy of the compliance plan, implementing ordinances, and information regarding the period of time encompassed by the judgment of compliance and a request for review by the court if the municipality has received a court ordered judgment of compliance. The court shall indicate if the Council is to monitor the development fees and authorize the Council to execute an escrow agreement pursuant to N.J.A.C. *[5:94]**5:97*-8.2.

(c) Once the Council has approved the development fee ordinance, the municipality's governing body may adopt the development fee ordinance, which shall be filed with the Council within seven days of adoption.

*[5:95]**5:96*-5.2 Amendment to an approved development fee ordinance

(a) A municipal amendment to an approved development fee ordinance pursuant to N.J.A.C. *[5:95]**5:96*-5.1 shall be reviewed and approved by the Council prior to the adoption and imposition of fees pursuant to the amendment.

(b) A municipality shall submit a request in the form of a resolution by the governing body for the Council to review and approve an amendment to an approved development fee ordinance.

(c) Once the Council has approved the development fee ordinance amendment, the municipality's governing body may adopt the amendment to the development fee ordinance, which shall be filed with the Council within seven days of adoption.

*[5:95]**5:96*-5.3 Spending plan review

(a) Pursuant to N.J.A.C. *[5:94]**5:97*-8.1(d), a municipality that seeks to maintain an affordable housing trust fund shall submit its proposed spending plan to the Council for review and approval prior to the spending of funds.

(b) A municipality shall submit a resolution by the governing body endorsing the spending plan compliant with N.J.A.C. *[5:94]**5:97*-8.10 and requesting review and approval by the Council, unless the spending plan was submitted as part of a petition pursuant to N.J.A.C. *[5:95]**5:96*-3.

*[5:95]**5:96*-5.4 Amendment to an approved spending plan

(a) An amendment to an approved spending plan shall be reviewed and approved by the Council prior to the spending of funds pursuant to the amendment.

(b) A municipality shall submit a request in the form of a resolution by the governing body endorsing the amendment to the spending plan compliant with N.J.A.C. *[5:94]**5:97*-8.10.

SUBCHAPTER 6. CONSIDERATION OF A MUNICIPALITY'S HOUSING ELEMENT AND FAIR SHARE PLAN WHEN NO OBJECTIONS ARE FILED

*[5:95]**5:96*-6.1 Overview

This subchapter outlines the procedures for the review of a Housing Element and Fair Share Plan to which no objections have been filed.

*[5:95]**5:96*-6.2 Council review

(a) After the expiration of the 45-day public review period pursuant to N.J.A.C. *[5:95]**5:96*-3.6, the Council's Executive Director shall conduct an in-depth review of the petition and prepare a report within 45 days which shall be circulated to the municipality and to the service list. The Council's Executive Director may extend the time in the event that the number of petitions for substantive certification exceeds the resources of the Council's staff to process such petitions. Public notice of any such extension shall be provided to the municipality and the service list. The report may:

1. Request additional information;
2. Recommend substantive certification; or
3. Recommend conditional substantive certification.

(b) Reports recommending substantive certification or conditional substantive certification shall be submitted to the municipality and the service list for a 14-day comment period prior to Council action on the petition for substantive certification.

(c) If the report requires additional information and/or necessary revisions to the Housing Element and Fair Share Plan to achieve certification, which may require a re-petition, the municipality shall provide said information to the Council and notify the service list within 60 days of issuance of the report. If a re-petition is required, the municipality shall follow the procedures outlined in N.J.A.C. *[5:95]**5:96*-3.4.

(d) If the municipality fails to submit the necessary documentation after receiving a report requesting additional information or fails to revise its Housing Element and Fair Share Plan as requested within the 60-day period, the

Council shall issue a report recommending denial, which shall be submitted to the municipality and the service list for a 14-day comment period prior to Council action on the petition for substantive certification. If, within 60 days of the Council's denial, the municipality submits its petition with changes satisfactory to the Council, the Council shall issue substantive certification.

(e) If the Council finds that a second re-petitioned Housing Element and Fair Share Plan continues to require substantial changes, such as the designation of additional inclusionary sites, a change in inclusionary sites, a substantial change in density or a fundamental change in approach, the Council shall dismiss the petition for substantive certification unless the Council has authorized the municipality to submit an additional re-petition pursuant to N.J.A.C.

*[5:95]**5:96*-3.4(c).

*[5:95]**5:96*-6.3 Grant of substantive certification

(a) The Council shall issue substantive certification of a municipality's Housing Element and Fair Share Plan if:

1. The municipality's proposed Housing Element and Fair Share Plan complies with this chapter and N.J.A.C. *[5:94]*
5:97;

2. The Housing Element and Fair Share Plan is consistent with the achievement of the low- and moderate-income housing needs of the region pursuant to this chapter and N.J.A.C. *[5:94]* *5:97*; and

3. The combination of the elimination of unnecessary housing cost-generating features from the municipal land use ordinances and regulations and the affirmative measures in the Housing Element and Fair Share Plan make the achievement of the municipality's fair share of low- and moderate-income housing realistically possible after allowing for the implementation of any regional contribution agreement approved by the Council.

(b) A grant of substantive certification shall run for a period of 10 years beginning on the date that a municipality files a Housing Element and Fair Share Plan with the Council in accordance with N.J.S.A. 52:27D-313, and not extending beyond December 31, 2019.

(c) A grant of substantive certification may contain such conditions and terms as the Council considers necessary to make the achievement of a municipality's fair share obligation realistically possible.

(d) The Council may condition a grant of substantive certification upon specific changes in the Housing Element or Fair Share Plan. Any conditions for approval shall be in writing and shall set forth the reasons for the conditions. If, within 60 days of the Council's conditional approval, the municipality submits changes satisfactory to the Council, the Council shall issue substantive certification. If the municipality fails to revise its Housing Element and Fair Share Plan within the 60-day period, the municipality shall be automatically dismissed from the Council's jurisdiction.

(e) Within 45 days of the grant of substantive certification, the municipality shall adopt its ordinances necessary for the implementation of the mechanisms designed to satisfy the fair share obligation, as approved by the Council. The Council's grant of substantive certification shall be void and of no force and effect in the event that the municipality fails to adopt its ordinances within 45 days.

*[5:95]**5:96*-6.4 Dismissal

If the Council dismisses or revokes a petition for substantive certification, the municipality shall no longer receive the benefits outlined in N.J.A.C. *[5:95]**5:96*-3.8. Such a municipality may revise its Housing Element and Fair Share Plan and submit a new petition no more than two times without prior authorization of the Council. Such new petition shall not extend the total period for which a municipality may receive either substantive certification or the benefits

outlined in N.J.A.C. *[5:95]**5:96*-3.8.

SUBCHAPTER 7. CONSIDERATION OF A MUNICIPALITY'S HOUSING ELEMENT AND FAIR SHARE PLAN WHEN OBJECTIONS ARE FILED

*[5:95]**5:96*-7.1 Overview

This subchapter sets forth the procedures for the review of a Housing Element and Fair Share Plan when one or more objections have been filed.

*[5:95]**5:96*-7.2 Municipalities that petition for substantive certification simultaneously with or within two years of filing their Housing Element and Fair Share Plan

(a) After the expiration of the 45-day public review period pursuant to N.J.A.C. *[5:95]**5:96*-3.6 for municipalities that petition for substantive certification simultaneously with or within two years of filing their Housing Element and Fair Share Plan, the Council's Executive Director shall conduct an in-depth review of the petition and prepare a premediation report within 45 days which shall be circulated to the municipality and to the service list. The Council's Executive Director may extend the time in the event that the number of petitions for substantive certification exceeds the resources of the Council's staff to process the petitions. Public notice of any such extension shall be provided to the municipality and to the service list.

(b) If the premediation report requires additional information and/or necessary revisions to the Housing Element and Fair Share Plan, which may require a re-petition, the municipality shall provide the requested information to the Council and notify the service list within 60 days of issuance of the report. If a re-petition is required, the municipality shall follow the procedures outlined in N.J.A.C. *[5:95]**5:96*-3.4.

(c) The mediation process shall commence in accordance to the procedures set forth in N.J.A.C. *[5:95]**5:96*-8.

*[5:95]**5:96*-7.3 Other municipalities

(a) The class of other municipalities includes those sued for exclusionary zoning either prior to filing a Housing Element and Fair Share Plan or after filing a Housing Element and Fair Share Plan where a petition for substantive certification was not submitted within two years, and municipalities transferred by the court to the Council.

(b) Once a petition is filed pursuant to N.J.A.C. *[5:95]**5:96*-2.3, the Council's Executive Director shall prepare a premediation report as described in N.J.A.C. *[5:95]**5:96*-7.2(a). The report shall indicate that the litigant is entitled to site-specific relief pursuant to N.J.A.C. *[5:95]**5:96*-3.8(b).

(c) If the premediation report requires additional information and/or necessary revisions to the Housing Element and Fair Share Plan, which may require a re-petition, the municipality shall provide the requested information to the Council and notify the service list within 60 days of issuance of the report. If a re-petition is required, the municipality shall follow the procedures outlined in N.J.A.C. *[5:95]**5:96*-3.4.

(d) The mediation process shall commence in accordance with the procedures set forth in N.J.A.C. *[5:95]**5:96*-8.

(e) If mediation concludes unsuccessfully and the Council determines there are contested issues of material fact regarding the suitability of a site pursuant to N.J.A.C. *[5:94]**5:97*-3.13, the Council may elect to either consider the contested issues of material fact at a scheduled Council meeting and render a final decision in the matter or refer the matter to OAL pursuant to N.J.A.C. *[5:95]**5:96*-9.

*[5:95]**5:96*-7.4 Substantive certification

(a) Upon review of a Housing Element and Fair Share Plan that responds to a mediation report pursuant to N.J.A.C. *[5:95]**5:96*-8.5 or an initial decision from OAL pursuant to N.J.A.C. *[5:95]**5:96*-9.2, the Council may grant substantive certification in accordance with *[5:95]**5:96*-6.3.

(b) In conducting its review set forth in this section, the Council's Executive Director may meet with the municipality and/or any objector thereto.

SUBCHAPTER 8. MEDIATION

*[5:95]**5:96*-8.1 General

Once an objection to a municipality's petition for substantive certification is deemed valid and complete pursuant to N.J.A.C. *[5:95]**5:96*-4.2(a), the Council's Executive Director may engage in mediation. The Executive Director may appoint a designee to act as the mediator in his or her place. The mediator shall meet with the representatives of the municipality and/or the objectors and attempt to mediate a resolution of the objections.

*[5:95]**5:96*-8.2 Participants to mediation

(a) The mediator shall have full and complete discretion to permit any person to participate in mediation upon a determination that such participation may facilitate mediation and/or help resolve an objection to a municipality's petition for substantive certification. A person invited to participate pursuant to this subsection shall be deemed a participant to mediation and shall be permitted to participate in mediation to the extent the mediator determines appropriate.

(b) An objector or site owner in accordance with N.J.A.C. *[5:95]**5:96*-3.7 shall be permitted to have a mediation team of not more than three representatives unless otherwise permitted by the mediator.

(c) A municipality shall have a mediation team comprised of two representatives in addition to a member of the municipal planning board and a member of the municipal governing body (who shall not be the same individual).

(d) Prior to the commencement of mediation, objectors and owners of sites in accordance with N.J.A.C. *[5:95]**5:96*-3.7 and the municipality shall designate their representatives, authorize the representatives to negotiate on their behalf, and also authorize one or more of the representatives to execute any written agreement reached during mediation on their behalf.

1. Objectors and owners of sites in accordance with N.J.A.C. *[5:95]**5:96*-3.7 shall submit such designations and authorization to the Council in writing.

2. Municipalities shall submit such designations and authorization to the Council in the form of a duly adopted resolution of the governing body.

(e) Additions or replacements to mediation teams shall be made only with the approval of the mediator and shall be immediately submitted to the Council in writing by the objector or property owner, and in the form of a duly adopted resolution by the municipality.

*[5:95]**5:96*-8.3 Scope of mediation

(a) If the Council's Executive Director finds that the objections raised are not relevant to the compliance mechanisms

included in the municipality's Fair Share Plan to address the municipal affordable housing obligation, mediation may be scheduled as quickly as practicable after the end of the 45-day objector period and prior to the issuance of the premediation report.

(b) If the Council's Executive Director finds that the objections raised are relevant to the compliance mechanisms included in the municipality's Fair Share Plan to address the municipal affordable housing obligation, mediation shall be scheduled after the municipality has responded to the Premediation Report and as often thereafter as the mediator shall determine necessary. Deadlines for the submission of information, reports, studies or other documentation may be imposed as the mediator finds necessary.

(c) The mediator may, upon notice to the participants during the course of mediation, rely upon or use any interim adjudications previously entered by a trial court in the matter or any stipulations previously entered into by the participants in any such litigation.

(d) During mediation the Council may choose to hear and decide an issue itself if, in the Council's determination such an inquiry would facilitate a satisfactory conclusion to the mediation process.

(e) Mediation may be conducted for a period of 90 days after the first scheduled mediation date. The period for mediation may be extended by the mediator for good cause shown.

(f) The mediator shall have the widest possible discretion as to the manner by which mediation is conducted.

*[5:95]**5:96*-8.4 Conclusion of mediation; mediation report

(a) The mediator may, for any reason, including, but not limited to, a lack of progress in the mediation proceedings or a determination that mediation cannot resolve a dispute, declare an end to mediation.

(b) At the conclusion of mediation, the Council's Executive Director may, in appropriate instances, require all participants to submit affidavits or certifications from individuals with personal knowledge of the facts at issue. If the Council determines there are contested issues of material fact, the Council may elect to either consider the contested issues of material fact at a scheduled Council meeting and render a final decision in the matter or refer the matter to OAL pursuant to N.J.A.C. *[5:95]**5:96*-9.

(c) At the conclusion of mediation, if the participants have reached an agreement, the participants shall submit the executed agreement to the Council within 45 days from the last mediation session. If the executed agreement is not submitted within 45 days, the Council may issue an Order to Show Cause at the next scheduled Council meeting to explain why the agreement has not been executed. The Council shall take whatever action it deems appropriate.

(d) The mediator shall prepare a mediation report within 60 days of the conclusion of mediation or the date the Council receives the executed agreement between the participants, whichever is later. The report shall, at a minimum:

1. Review any objections that have been successfully resolved and the status of any remaining unresolved issues, including a recommendation as to whether there are contested issues of material fact that necessitate consideration by the Council or the transfer to OAL;

2. Describe whether the municipality has included the objector's proposed site in a re-petition, or has addressed any shortfall noted in the premediation report pursuant to N.J.A.C. *[5:95]**5:96*-7.2(b) through the addition of other compliance mechanisms; and

3. Present the stipulations or other agreements reached by the municipality and the objectors.

(e) The mediation report shall be submitted to the municipality and all participants to the mediation, including owners of sites in accordance with N.J.A.C. *[5:95]**5:96*-3.7 and owners of sites in any proposed revision resulting from mediation for a 14-day comment period. At the conclusion of the 14-day comment period, the mediation report and any comments thereto shall be presented to the Council at the next scheduled Council meeting.

(f) The participants shall be bound by any agreements entered into during mediation when formally reduced to writing and signed by the participants.

***[5:95]**5:96*-8.5 Revision of Housing Element and Fair Share Plan as a result of mediation**

(a) If an amendment and/or revision to the municipality's Housing Element and Fair Share Plan is required as a result of mediation, at the close of mediation, the municipality shall submit a resolution from the governing body committing to amend and/or revise its Housing Element and Fair Share Plan within 60 days of the conclusion of mediation.

(b) Revisions to the originally filed municipal Housing Element and Fair Share Plan that are determined to be substantial in accordance with N.J.A.C. *[5:95]**5:96*-3.4(a) shall require a re-petition pursuant to N.J.A.C. *[5:95]**5:96*-3.2.

(c) If the revisions to the municipal Housing Element and Fair Share Plan are not substantial in accordance with N.J.A.C. *[5:95]**5:96*-3.4(b), the municipality may request that the revision be done by motion pursuant to N.J.A.C. *[5:95]**5:96*-13.

(d) If mediation occurs subsequent to a municipal re-petition and the mediation proceedings fail to progress or mediation cannot resolve a dispute and the objector's site is in conformance with N.J.A.C. *[5:94]**5:97*-3.13, the Council may direct the municipality to amend its Housing Element and Fair Share Plan to include the objector's site to address any shortfall noted in the premediation report.

(e) If the municipality fails to revise its Housing Element and Fair Share Plan as a result of mediation within 60 days from the conclusion of mediation, the Council shall dismiss the municipal submission by administrative order or deny it pursuant to N.J.A.C. *[5:95]**5:96*-6.2(d).

***[5:95]**5:96*-8.6 Reopened mediation**

(a) If during the public review period pursuant N.J.A.C. *[5:95]**5:96*-3.6, an objection is filed to a previously mediated and revised Housing Element and Fair Share Plan, mediation may be reopened for a period not to exceed 60 days.

(b) The mediator shall consider only those objections to the portions of the Housing Element and Fair Share Plan that have been revised following mediation.

(c) If mediation is reopened, the municipality and objectors to both the initial Housing Element and Fair Share Plan and to the proposed mediated Housing Element and Fair Share Plan shall be given the opportunity to participate in the reopened mediation.

(d) At the end of the reopened mediation or the date the Council receives the executed agreement between the participants, whichever is later, the mediator shall prepare another mediation report within 30 days. The report shall list all issues that remain in dispute between the municipality and the objectors and shall present the stipulations or other agreements reached by the municipality and the objectors. The mediation report shall be open for comment pursuant to N.J.A.C. *[5:95]**5:96*-8.4(e).

(e) Following a reopened mediation and the presentation of the second mediation report to the Council, the procedures in N.J.A.C. *[5:95]**5:96*-8.5 shall be followed.

SUBCHAPTER 9. REFERRAL TO THE OFFICE OF ADMINISTRATIVE LAW

*[5:95]**5:96*-9.1 General

(a) In the event contested issues of material fact remain following mediation, the Council, upon the motion of any party or in its own discretion, shall determine whether to consider the issues at a scheduled Council meeting or refer the matter to the Office of Administrative Law (OAL) for resolution as a contested case, pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(b) Upon determining that the matter shall be referred to OAL for adjudication as a contested case, the Council shall transmit the matter to OAL together with the mediation report, the municipality's petition for substantive certification and any objections thereto, and any other documentation pertinent to the adjudication.

(c) The cost of the transcript of all oral testimony transmitted to OAL from the Council shall be shared equally by the municipality and the objectors.

*[5:95]**5:96*-9.2 Review

Within 45 days after the issuance of an initial decision from OAL, the Council shall review the initial decision of the Administrative Law Judge, the record upon which it is based and all exceptions to the initial decision. The Council shall then accept, reject or modify the decision and issue its final decision on the matter. The decision of the Administrative Law Judge shall be deemed adopted and shall become the final decision of the Council unless the Council modifies or rejects the initial decision within this period of time. For good cause shown the time limit established under this subchapter may be extended pursuant to N.J.A.C. 1:1-16.6.

SUBCHAPTER 10. PLAN EVALUATION

*[5:95]**5:96*-10.1 Plan evaluation report

(a) The Council shall conduct biennial plan evaluations upon substantive certification of a municipality's Housing Element and Fair Share Plan. The purpose of the plan evaluation is to verify that the construction or provision of affordable housing has been in proportion to the actual residential growth and employment growth in the municipality and to determine that the mechanisms addressing the projected growth share obligation continue to present a realistic opportunity for the creation of affordable housing. The Council's Executive Director may also review a municipality's Housing Element and Fair Share Plan at any time to determine if a municipal plan addresses the affordable housing obligation set forth in N.J.A.C. *[5:94]**5:97*-2.

(b) The Council's Executive Director shall issue a report to the municipality and the service list based on a review that considers, at a minimum, the following information:

1. The actual residential growth-related need, measured from January 1, 2004 up to and including the date that the review period ended based on the provisions of N.J.A.C. *[5:94]**5:97*-2.5;

2. The actual employment growth-related need measured from January 1, 2004 up to and including the date that the review period ended based on the provisions of N.J.A.C. *[5:94]**5:97*-2.5;

3. The status of the mechanisms included in a municipality's Housing Element and Fair Share Plan and funding sources, if applicable, designed to meet the total affordable housing obligation (1987 through 2018), including:

i. The number of affordable units for which certificates of occupancy have been issued that were needed to address the growth share obligation;

ii. The number of affordable units for which certificates of occupancy have been issued that were needed to address the municipality's prior round obligation;

iii. The number of units that have been rehabilitated to address the municipality's rehabilitation share; and

iv. The implementing ordinances designed to address the fair share obligation, including the ongoing viability of the mechanisms pursuant to N.J.A.C. *[5:94]**5:97*-6; and

4. An accounting of any housing trust fund activity, including the source and amount of funds collected, the amount and purpose for which any funds have been expended, and the status of the plan to spend the remaining balance pursuant to N.J.A.C. *[5:94]**5:97*-8.10(a)8;

5. The amount of funds transferred pursuant to any RCAs;

6. A comparison of the projected growth share and the actual need on the date of the report and any supporting documentation citing the reasons for any shortfall;

7. Any revisions to the Fair Share Plan that are needed to address any shortfall between the actual growth-related need and the number of affordable units actually provided;

8. *[The]* ***If applicable, the*** status of the municipality's application for plan endorsement from the State Planning Commission;

9. An evaluation of the results of the municipality's affirmative marketing activities;

10. Any other information pertaining to the review of the municipality's progress in addressing its fair share obligation.

*[5:95]**5:96*-10.2 Notice

(a) Within seven days of the issuance of the results of the Council's review, the municipality shall publish notice that the results of the Council's review are available for public inspection at the offices of the municipality. The public notice shall be in the legal newspaper of the municipality as well as one that is widely circulated within the county if the legal newspaper is not widely circulated within the county. If the Council's Executive Director determines that notice was not published in a newspaper of general circulation, it shall require the municipality to re-publish in another newspaper.

(b) Notice shall be provided in the following format:

Notice of the Council on Affordable Housing Plan Review

NOTICE is hereby given that (MUNICIPALITY) has filed monitoring with the New Jersey Council on Affordable Housing pursuant to N.J.S.A. 52:27D-301 et seq. and N.J.A.C. *[5:95]**5:96*-11 et seq. The Council on Affordable Housing has reviewed the Housing Element and Fair Share Plan and monitoring and issued a report. A copy the Council on Affordable Housing report is available for public inspection at the office of the (MUNICIPAL CLERK, etc.), Municipal Building, located at (STREET ADDRESS), during the hours of _____.

Municipal Clerk

*[5:95]**5:96*-10.3 Public review

The municipality shall make copies of the results of the Council's review available for public inspection during regular business hours within the municipality. The Council shall publish the results on its website.

*[5:95]**5:96*-10.4 Enforcement

(a) If upon any biennial review the difference between the number of affordable units constructed or provided in a municipality and the number of units required pursuant to N.J.A.C. *[5:94]**5:97*-2.4 results in a pro-rated production shortage of 10 percent or greater, the municipality is not adhering to its implementation schedule pursuant to N.J.A.C. *[5:94]**5:97*-3.2(a), or the mechanisms addressing the projected growth share obligation no longer present a realistic opportunity for the creation of affordable housing, the Council may direct the municipality to amend its plan in conformance with N.J.A.C. *[5:95]**5:96*-14 to address the affordable housing obligation set forth in N.J.A.C. *[5:94]**5:97*-2.5. Upon a finding that a municipality is no longer meeting its affordable housing obligation, the report issued pursuant to N.J.A.C. *[5:95]**5:96*-10.1(b) shall set forth the reasons for such finding and provide a 90-day period for the submission of an amended Housing Element and Fair Share Plan that will meet the affordable housing obligation.

(b) If upon review of a Housing Element and Fair Share Plan that has been amended in response to (a) above, the Council finds that the plan still does not provide for the affordable housing obligation set forth in N.J.A.C. *[5:94]**5:97*-2.5, the Council shall issue an administrative order directing that specific corrective actions be taken and shall establish timeframes for such actions for a period not to exceed 120 days. Failure to comply with the administrative order shall result in the revocation of substantive certification.

SUBCHAPTER 11. MONITORING

*[5:95]**5:96*-11.1 Applicability

(a) Municipalities that are under the jurisdiction of the Council, are RCA receiving municipalities, maintain affordable housing trust funds, or are under the jurisdiction of the court and have been ordered to submit monitoring to the Council shall provide monitoring information in accordance with this subchapter at such time and in such form as the Council requires, but at least once a year.

(b) Municipalities with expired, revoked or dismissed plans shall provide monitoring information until the expiration of the controls on affordability of affordable units.

*[5:95]**5:96*-11.2 Monitoring of actual growth

The municipal housing liaison shall provide information regarding the municipality's actual growth pursuant to N.J.A.C. *[5:94]**5:97*-2.5, which shall be certified by the mayor.

*[5:95]**5:96*-11.3 Monitoring of affordable housing programs and affordable units

(a) The municipal housing liaison shall provide information to the Council setting forth the status of all affordable housing programs and affordable units, which may include proposed units, rehabilitated units, or newly constructed

units.

(b) Where applicable, this information shall be provided to the New Jersey Meadowlands Commission, the Highlands Water Protection and Planning Council or the Pinelands Commission.

***[5:95]**5:96*-11.4 Monitoring of Regional Contribution Agreements**

The RCA administrator shall provide RCA monitoring information pursuant to N.J.A.C. ***[5:94]**5:97*-7.9.**

***[5:95]**5:96*-11.5 Monitoring of affordable housing trust funds**

Municipalities that maintain affordable housing trust funds shall provide monitoring information pursuant to N.J.A.C. ***[5:94]**5:97*-8.12.**

***[5:95]**5:96*-11.6 Monitoring of affirmative marketing plans**

The municipal housing liaison or RCA administrator shall provide information regarding the municipality's affirmative marketing pursuant to UHAC.

***[5:95]**5:96*-11.7 Audits**

Audits of municipal affordable housing files may be conducted to ensure that all affordable housing programs and trust funds are administered in accordance with the Council's rules.

***[5:95]**5:96*-11.8 Enforcement**

(a) Municipalities that fail to provide monitoring information within the time and in the form required by the Council may be subject to Council action.

(b) If it is determined that the affordable housing programs are not being administered in accordance with the Council's rules, the municipality may be subject to Council action. Such action may include, but is not limited to, one or more of the following:

1. Revoking credit for the affordable housing programs and/or affordable units that are in violation of the Council's rules;
2. Requiring the municipality to enact its municipal resolution appropriating funds from general revenue or its resolution of intent to bond, in the event there is a shortfall in funding for a proposed mechanism;
3. Directing the municipality to amend its plan to address any shortfall;
4. Revoking approval of the municipal housing liaison, the RCA administrator and/or the administrative agent; or
5. Such other actions as the Council may determine necessary.

SUBCHAPTER 12. GENERAL POWERS

***[5:95]**5:96*-12.1 Orders to restrain scarce resources**

At any time, upon its own determination or upon the application of any interested person, and after consideration of that

application by the Council, the Council may issue such orders as may be necessary to require that a municipality take appropriate measures to reserve scarce resources that may be essential to fulfill the municipality's fair share obligation. The Council may require additional information or documentation necessary to determine whether the issuance of a scarce resource restraint is appropriate.

***[5:95]**5:96*-12.2 Accelerated denial of substantive certification**

At any time, upon its own determination, or upon the application of any interested person, the Council may deny substantive certification without proceeding further with the mediation and review process.

***[5:95]**5:96*-12.3 Administrative orders**

At any time, upon its own determination, or upon the application of an interested person, the Council may issue an administrative order for a municipality to provide information or take an action that expedites the Council's administrative process and/or the production of low- and moderate-income housing. The Council may dismiss a municipal Housing Element and Fair Share Plan or revoke substantive certification by administrative order. The order shall set forth in detail the reasons for the dismissal or revocation and the actions the municipality shall take before it may refile its Housing Element and Fair Share Plan.

***[5:95]**5:96*-12.4 Orders to show cause**

At any time, upon its own discretion, the Council may issue an Order to Show Cause for a municipality to appear before the Council, provide any information requested by the Council, and show cause why the Council should not limit or terminate the benefits of the Council's jurisdiction or take any other action it deems necessary.

SUBCHAPTER 13. MOTIONS

***[5:95]**5:96*-13.1 Form of motion**

(a) An application to the Council for an order shall be by motion. A motion shall be by notice of motion in writing unless the Council permits it to be made orally. Every motion shall state the time and place when it is to be presented to the Council, the grounds upon which it is made, and the nature of the relief sought. When a matter becomes a contested case, motions shall generally be made to OAL pursuant to N.J.A.C. 1:1-12.

(b) A party shall submit one original and 20 copies of all motions, answering papers and accompanying papers. Alternatively, a party may submit one original in a hard copy format and an electronic format. All papers shall be accompanied by a certification of service.

(c) The Council shall not accept motions for reconsideration.

(d) The Council shall not accept a motion if an objection has been filed pursuant to N.J.A.C. *[5:95]**5:96*-4.1 by the same party on substantially the same matter. After the participants have completed mediation, a motion may be filed on the matter. The mediator shall determine if the motion presents a substantial change in facts or law and, upon a positive finding, shall refer the matter to the Council.

***[5:95]**5:96*-13.2 Affidavits, briefs and supporting statements**

Motions and answering papers shall be accompanied by all necessary supporting affidavits, briefs and documents. All motions and answering papers shall be supported by affidavits for facts relied upon which are not of record or which are not subject to official notice. Such affidavits shall set forth only facts to which the affiants are competent to testify.

Properly verified copies of all papers referred to in such affidavits shall be annexed thereto.

***[5:95]**5:96*-13.3 Oral argument**

A movant's request for oral argument shall be made either in the moving papers or in the reply. A respondent's request for oral argument shall be made in the answering papers. All requests for oral argument shall state the reasons therefore. The Council's Executive Director shall determine whether motions shall be heard on the papers or through oral argument.

***[5:95]**5:96*-13.4 Time for serving and filing motions and affidavits or briefs**

(a) A notice of motion shall establish a return date at least 30 days from the date of service upon the opposing party. All motions, except those that seek emergent relief, shall be made returnable at least 10 days prior to a regularly scheduled meeting of the Council. If a motion is supported by an affidavit or brief, the affidavit or brief shall be served and filed not later than 20 days after receipt of the moving papers. Answers or responses to any opposing affidavits or briefs or to any cross-motions shall be served and filed not later than 10 days after receipt of the opposing papers. The Executive Director may reschedule any motion hearing as necessary.

(b) A party seeking emergent relief shall contact the Council's Executive Director to request an emergency hearing by the Council. A determination to proceed with emergent relief shall be made by the Executive Director.

***[5:95]**5:96*-13.5 Orders**

The Council shall render a decision on the motion and may instruct the prevailing party to prepare and submit an appropriate order. If the Council has made findings of fact and conclusions of law explaining its disposition of the motion the order shall so indicate.

SUBCHAPTER 14. AMENDMENT OF SUBSTANTIVE CERTIFICATION

***[5:95]**5:96*-14.1 General**

(a) A municipality or any other person may request amendments to the terms of substantive certification. Amendments may be approved by the Council at any time following a grant of substantive certification. Amendments may be required by the Council at any time if it is determined that the municipality is no longer meeting the affordable housing obligation set forth in N.J.A.C. *[5:94]* ***5:97***.

(b) A municipality seeking an amendment to substantive certification that requires a change in site, substantial change in density, a change in other zoning requirements that results in a change of housing type on a specific site, or a fundamental change in approach to its low- and moderate-income housing obligation shall petition for such an amendment pursuant to N.J.A.C. *[5:95]**5:96*-14.2. However, if the amendment alters the plan to address the municipality's fair share obligation by 10 percent or less, it may be considered a minor technical amendment pursuant to (c) below.

(c) A municipality seeking a minor technical amendment to its certified Housing Element and Fair Share Plan that does not substantially alter the terms of certification pursuant to (b) above may request such an amendment by motion pursuant to N.J.A.C. *[5:95]**5:96*-14.3. Examples include, but are not limited to, changing the number of units in an existing mechanism, adding a program that is not site specific, or altering the plan to address the municipality's fair share obligation by 10 percent or less.

(d) Requests for amendments of the terms of substantive certification may be made by motion by any party other than a

municipality pursuant to N.J.A.C. *[5:95]**5:96*-14.3. If the motion requests a change in site, a substantial change in density, a change in other zoning requirements that results in a change of housing type on a specific site, or a fundamental change in how the municipal low- and moderate-income housing obligation is addressed, and if the municipality does not object to the motion, the Council may direct the municipality to seek a plan amendment by petition pursuant to N.J.A.C. *[5:95]**5:96*-14.2.

(e) All parties to the substantive certification, including the municipality and all objectors, shall be permitted to comment on any proposed amendment by motion.

(f) A municipality shall not amend zoning on sites included in the certified Housing Element and Fair Share Plan without notice to the affected property owner. In amending zoning, a municipality shall adhere to the criteria outlined in N.J.A.C. *[5:94]**5:97*-6.4.

*[5:95]**5:96*-14.2 Municipal petition to amend

(a) A municipal petition to amend the terms of its certification shall at a minimum include the following information, as well as any other information requested by the Council's Executive Director:

1. A summary of, and detailed reasons for, the proposed amendment;
2. A duly adopted resolution of the municipal planning board adopting the amended Housing Element and Fair Share Plan, conditioned upon approval by the Council;
3. A duly adopted resolution of the municipal governing body endorsing the amended Housing Element and Fair Share Plan and requesting Council review and approval of the amended petition;
4. A copy of the amended Housing Element in conformance with N.J.A.C. *[5:94]**5:97*-2.3(a) and Fair Share Plan with all necessary information and documentation as required by the Council in conformance with N.J.A.C. *[5:94]**5:97*-3.2(a);
5. Proof of notice of the petition to the service list pursuant to N.J.A.C. *[5:95]**5:96*-3.7; and
6. Proof of public notice pursuant to N.J.A.C. *[5:95]**5:96*-14.4(a).

(b) The information required in (a)1 through 4 above shall be submitted to the Council by the municipality at the time it petitions for an amendment. The information required in (a)5 above shall be submitted to the Council within seven days of the date of the municipality's petition to amend.

*[5:95]**5:96*-14.3 Amendment by motion

(a) A motion to amend the terms of a certification by a municipality or other party shall follow the requirements of N.J.A.C. *[5:95]**5:96*-13 and shall at a minimum include, the following information, as well as any other information requested by the Council's Executive Director:

1. A summary of, and detailed reasons for, the proposed amendment;
2. Proof of notice of the motion to the service list pursuant to N.J.A.C. *[5:95]**5:96*-3.7; and
3. If a party other than the municipality moves to amend the terms of certification, the municipality shall publish notice of the motion in a form required by the Council. The municipality may require the moving party to pay the cost of

publishing the required notice. The municipality shall submit proof of publication to the Council within seven days of the Council's issuance of notification to publish notice.

*[5:95]**5:96*-14.4 Notice of petition to amend

(a) A municipality that has petitioned to amend its substantive certification shall publish notice of the amended petition in a newspaper of general circulation within the municipality and the county in the following format:

NOTICE OF PETITION TO AMEND SUBSTANTIVE CERTIFICATION

NOTICE is hereby given that (MUNICIPALITY) has petitioned the New Jersey Council on Affordable Housing to amend its Substantive Certification pursuant to N.J.S.A. 52:27D-301 et seq. and N.J.A.C. *[5:95]**5:96*-14 et seq. The (MUNICIPALITY) Planning Board, subsequent to public hearing, adopted a revision to its Housing Element and Fair Share Plan on (DATE). The adopted plan is a revision of a previously adopted Housing Element and Fair Share Plan for which the (TOWNSHIP/BOROUGH/TOWN/CITY) received substantive certification on (DATE).

(INSERT BRIEF DESCRIPTION OF AMENDMENT)

A copy of the amended and adopted Housing Element and Fair Share Plan and supporting documentation is available for public inspection at the office of the (MUNICIPAL CLERK, etc.), Municipal Building, located at (STREET ADDRESS), during the hours of _____. Comments or objections to said petition to amend shall be filed with the Council on Affordable Housing, 101 South Broad Street, PO Box 813, Trenton, New Jersey 08625-0813 and with the municipal clerk by (DATE), which is within 45 days of publication of this notice.

Municipal Clerk

(b) An updated list of all petitions for amendments to substantive certification received and granted by the Council shall be published monthly on its website.

*[5:95]**5:96*-14.5 Objections to petitions to amend

(a) Within 45 days of the publication of a notice of a petition to amend the terms of substantive certification, any person may file objections to the terms of the proposed amendment with the Council. Objections shall be filed with the Council and the municipality. The Council shall not consider any objection to its rules and regulations as a valid objection. An objection shall be in a form as may be determined by the Council's Executive Director and shall include, at a minimum, the following:

1. A clear and complete statement as to each aspect of the municipality's proposed amendment to its Housing Element and Fair Share Plan to which an objection is made;
2. An explanation of the basis for each objection including, where appropriate, citations to expert reports, studies or other data relied upon to support each objection;
3. Copies of all referenced expert reports, studies or other data relied upon by the objector;
4. Proposed modifications, changes or other measures which the objector contends will resolve the objection and an explanation of how the objector's proposals are consistent with the Council's criteria and guidelines;

5. A statement documenting the objector's prior efforts at premediation, participation in conferences or public hearings and a summary of the results of any such efforts; and

6. Identification and a description of any site proposed by the objector, including a history of development applications (if any), for inclusion in the Housing Element and Fair Share Plan and demonstration that the site proposed for inclusion in the Housing Element and Fair Share Plan is suitable in accordance with N.J.A.C. *[5:94]**5:97*-3.13.

*[5:95]**5:96*-14.6 Review of objections

(a) The Council's Executive Director shall review objections subject to the requirements of N.J.A.C.

*[5:95]**5:96*-14.5 to determine completeness and validity. The Council shall notify the objector who has filed an objection and the service list that the objection is complete and valid and that the objector is permitted to participate in the Council's administrative process beginning with mediation as set forth in N.J.A.C. *[5:95]**5:96*-8.

(b) Objections that are determined to be incomplete or invalid shall be returned to the objector who shall have 14 days to correct deficiencies and resubmit them in a manner conforming to N.J.A.C. *[5:95]**5:96*-14.5. If the objections are not resubmitted within the 14 days, the Council shall consider the objections to be withdrawn.

(c) The municipality shall submit a written response to all items delineated in the objector's objection, including, if applicable, the reason(s) the objector's proposed site was not included in the Housing Element and Fair Share Plan. Such written response shall be submitted to the Council and service list within 20 days of the notification letter issued in accordance with (a) above.

(d) After the expiration of the 45-day public review period pursuant to N.J.A.C. *[5:95]**5:96*-14.5, the Council's Executive Director shall conduct an in-depth review of the amendment, each objection, and the municipal response and prepare a premediation report which shall be circulated to the municipality and to the service list.

(e) The mediation process shall commence in accordance to the procedures set forth in N.J.A.C. *[5:95]**5:96*-8.

SUBCHAPTER 15. WAIVERS

*[5:95]**5:96*-15.1 General

Any person may request a waiver from a specific requirement of the Council's rules at any time. Such a waiver may be requested as part of a municipal petition, by motion in conformance with N.J.A.C. *[5:95]**5:96*-13, or in such other form as the Council may determine, consistent with this chapter.

*[5:95]**5:96*-15.2 Waiver requirements

(a) The Council may grant waivers from specific provisions of its rules if the person demonstrates that:

1. The strict application of the rule would create an unnecessary financial, environmental or other hardship;
2. Granting the waiver fosters the production of affordable housing;
3. Granting the waiver fosters the intent of, if not the letter of, the Council's rules; and
4. The Housing Element and Fair Share Plan provide a mix of housing options.

SUBCHAPTER 16. JURISDICTIONAL AND TRANSITIONAL PROCEDURES

*[5:95]**5:96*-16.1 Municipalities that received second round substantive certification prior to December 20, 2004 that expires subsequent to *[(effective date of this chapter)]* ***June 2, 2008***

(a) The Council shall continue to review and approve RCAs, conduct mediation that is in progress, and review and approve amendments to second round certified plans for municipalities that received second round substantive certification prior to December 20, 2004 that expires subsequent to *[(effective date of this chapter)]* ***June 2, 2008*** until the expiration of substantive certification.

(b) To remain under the jurisdiction of the Council for the third round fair share obligation, a municipality with second round substantive certification that expires subsequent to *[(effective date of this chapter)]* ***June 2, 2008*** shall file or petition with a third round Housing Element and Fair Share Plan by the earlier of the expiration date of its second round substantive certification or the date set forth in N.J.A.C. *[5:95]**5:96*-16.2.

*[5:95]**5:96*-16.2 Municipalities that petitioned for but did not receive third round substantive certification

(a) To remain under the jurisdiction of the Council, a municipality that petitioned for but did not receive third round substantive certification shall re-petition with an amended third round Housing Element and Fair Share Plan in accordance with the following schedule:

1. On or before September 30, 2008: Municipalities located in Atlantic, Bergen, Burlington, Essex, Mercer, Passaic and Union Counties;
2. On or before November 14, 2008: Municipalities located in Camden, Cape May, Hudson, Middlesex, Monmouth, Morris and Salem Counties; and
3. On or before December 31, 2008: Municipalities located in Cumberland, Gloucester, Hunterdon, Ocean, Somerset, Sussex and Warren Counties.

SUBCHAPTER 17. MUNICIPAL HOUSING LIAISON

*[5:95]**5:96*-17.1 Requirement for a municipal housing liaison

(a) All municipalities that have created or will create affordable housing programs and/or affordable units shall establish the position of a municipal housing liaison by ordinance and, subject to the approval of the Council's Executive Director, appoint a municipal employee to serve in this position.

(b) The municipal housing liaison is responsible for oversight and coordination of all the activities of the municipal government as it relates to the creation, preservation and administration of affordable housing programs and/or affordable units.

*[5:95]**5:96*-17.2 Responsibilities of the municipal housing liaison

(a) The following responsibilities of the municipal housing liaison may not be contracted out:

1. Serving as the municipality's primary point of contact for all inquiries from the State, affordable housing providers, administrative agents, and interested households;
2. Monitoring the status of all proposed and completed affordable housing programs and affordable units in the municipality's Fair Share Plan;

3. Compiling, verifying, and providing monitoring information at such time and in such form as the Council requires;
4. Coordinating meetings with affordable housing providers and administrative agents, as applicable; and
5. Where applicable, providing to an administrative agent a copy of the adopted municipal operating manual(s), Housing Element and Fair Share Plan and ordinances relating to the creation and administration of the municipality's affordable housing programs and/or affordable units.

(b) The municipal housing liaison may also serve as the administrative agent pursuant to N.J.A.C. *[5:95]**5:96*-18 for some or all of the affordable units in the municipality. These duties shall be outlined in the municipal ordinance establishing the position of the municipal housing liaison. All applicable tasks not performed by the municipal housing liaison, shall be contracted to an administrative agent pursuant to N.J.A.C. *[5:95]**5:96*-18.

*[5:95]**5:96*-17.3 Approval of the municipal housing liaison

(a) The appointment of the municipal housing liaison is subject to review and approval by the Council's Executive Director.

(b) Upon petitioning the Council for substantive certification, the municipality shall submit its ordinance establishing the position of the municipal housing liaison and a resolution by the governing body or a letter from the chief executive appointing a municipal employee to serve as the municipal housing liaison.

(c) If the municipal housing liaison is to perform the duties of an administrative agent, the municipality shall also submit evidence of the municipal housing liaison's history of successful management of affordable housing units, particularly those produced as a result of the New Jersey Fair Housing Act or through a *Mount Laurel* court settlement, which shall include:

1. A resume;
2. A statement of qualifications; and
3. A statement of intent to attend continuing education opportunities related to the creation, preservation and administration of affordable housing programs and/or affordable units provided by the Council.

(d) The Council shall monitor the performance of the approved municipal housing liaison. In the event the municipal housing liaison does not administer the municipality's affordable housing program and/or affordable units in accordance with the Council's rules, the Council may revoke its approval.

*[5:95]**5:96*-17.4 Education requirements

(a) In order to receive approval, all appointed municipal housing liaisons shall successfully complete the Council's Education Program for Municipal Housing Liaisons as described in N.J.A.C. *[5:95]**5:96*-20 in the timeframes set forth below:

1. Any municipal employee already serving as municipal housing liaison as of *[(effective date of this chapter)]* ***June 2, 2008*** shall be required to successfully complete the Education Program for Municipal Housing Liaisons by the later of *[(six months from the effective date of this chapter)]* ***December 2, 2008***, or the date of the next Education Program for Municipal Housing Liaisons.

2. Any municipal employee appointed to serve as municipal housing liaison subsequent to *[(effective date of this chapter)]* ***June 2, 2008*** shall be required to successfully complete the Education Program for Municipal Housing Liaisons by the later of six months from the date of appointment, or the date of the next Education Program for Municipal Housing Liaisons.

(b) If the municipal housing liaison is to perform the duties of an administrative agent, in order to receive approval, the municipal housing liaison shall also successfully complete the Council's Education Program for Administrative Agents as described in N.J.A.C. *[5:95]****5:96*-20** in the timeframes set forth below:

1. Any municipal employee already serving as municipal housing liaison as of *[(effective date of this chapter)]* ***June 2, 2008*** shall be required to successfully complete the Education Program for Administrative Agents by the later of *[(one year from the effective date of this chapter)]* ***June 2, 2009***, or one year after the date of the first Education Program for Administrative Agents.

2. Any municipal employee appointed to serve as municipal housing liaison subsequent to *[(effective date of this chapter)]* ***June 2, 2008*** shall be required to successfully complete the Education Program for Administrative Agents by the later of one year from the date of appointment, or the date of the next Education Program for Administrative Agents.

(c) Approved municipal housing liaisons shall also attend continuing education opportunities related to the creation, preservation and administration of affordable housing programs and/or affordable units provided by the Council.

SUBCHAPTER 18. ADMINISTRATIVE AGENT

*[5:95]****5:96*-18.1** Requirement for an administrative agent

(a) All municipalities that have created or will create affordable housing programs and/or affordable units may designate one or more administrative agent(s) to administer the affordable housing program and/or affordable units in accordance with the Council's rules and UHAC.

(b) The administrative agent may be the municipal housing liaison, the RCA administrator, or a person or entity selected pursuant to UHAC.

(c) The administrative agent may perform some or all of the duties and responsibilities of an administrative agent as set forth in UHAC.

*[5:95]****5:96*-18.2** Approval of administrative agent

(a) The designation of the administrative agent is subject to review and approval by the Council's Executive Director.

(b) An administrative agent may apply directly to the Council for approval by submitting the following:

1. All documentation required for designation of an administrative agent as set forth in UHAC;
2. A sample contract;
3. A sample operating manual for each type of program and/or unit the administrative agent seeks to administer;
4. Evidence of satisfactory completion of the Council's Education Program for Administrative Agents as described in N.J.A.C. *[5:95]****5:96*-20**; and

5. Any additional documentation required by the Council's Executive Director.

(c) The Council shall maintain and publish on its website a list of approved administrative agents, which includes the Agency in accordance with N.J.S.A. 52:27D-324.

(d) If the administrative agent is not currently approved, evidenced by (c) above, the municipality shall submit to the Council all documentation required for designation of each administrative agent as set forth in UHAC.

(e) The Council shall monitor the performance of all approved administrative agents. In the event the administrative agent does not administer a municipality's affordable housing program and/or affordable units in accordance with the Council's regulations, the Council may revoke its approval.

*[5:95]**5:96*-18.3 Education requirements

(a) All administrative agents shall successfully complete the Council's Education Program for Administrative Agents as described in N.J.A.C. *[5:95]**5:96*-20 in the timeframes set forth below:

1. Any person or entity already serving as an administrative agent as of *[(effective date of this chapter)]* ***June 2, 2008*** shall successfully complete the Education Program for Administrative Agents by *[(two years from the effective date of this chapter)]* ***June 2, 2010***.

2. Any person or entity who anticipates serving as an administrative agent subsequent to *[(effective date of this chapter)]* ***June 2, 2008*** shall successfully complete the Education Program for Administrative Agents prior to designation by a municipality.

3. If there is a delay in the availability of one or more sessions required to complete the Education Program for Administrative Agents, the Council may extend the period in which an administrative agent shall successfully complete the Education Program for Administrative Agents.

(b) Approved administrative agents shall also attend continuing education opportunities related to the creation, preservation and administration of affordable housing programs and/or affordable units provided by the Council.

SUBCHAPTER 19. RCA ADMINISTRATOR

*[5:95]**5:96*-19.1 Requirement for an RCA administrator

(a) All municipalities receiving funds through an RCA shall establish the position of RCA administrator by ordinance and, subject to the approval of the Council's Executive Director, appoint a municipal employee to serve in this position.

(b) The RCA administrator is responsible for oversight and coordination of all the activities of the municipal government as it relates to the creation, preservation and administration of affordable housing units funded through RCAs.

*[5:95]**5:96*-19.2 Responsibilities of the RCA administrator

(a) The following responsibilities of the RCA administrator may not be contracted out:

1. Serving as the municipality's primary point of contact for all inquiries from the State, affordable housing providers, administrative agents, and interested households;

2. Establishing an escrow account(s) for the funds associated with each RCA and coordinating the execution of an escrow agreement between the receiving municipality, the bank and the Council;

3. Monitoring the status of all proposed and completed affordable housing programs and affordable units in the municipality funded through Regional Contribution Agreements;

4. Compiling, verifying, and submitting reports at such time and in such form as the Council requires;

5. Coordinating meetings with affordable housing providers and administrative agents, as applicable; and

6. Where applicable, providing to an administrative agent a copy of the adopted municipal operating manual(s), RCA Project Plan and ordinances relating to the creation and administration of the municipality's affordable housing programs and/or affordable units funded through Regional Contribution Agreements.

(b) The RCA administrator may also serve as the administrative agent pursuant to N.J.A.C. *[5:95]**5:96*-18 for some or all of the affordable units in the municipality funded through RCAs. These duties shall be outlined in the municipal ordinance establishing the position of the RCA administrator. All applicable tasks not performed by the RCA administrator, shall be contracted to an administrative agent pursuant to N.J.A.C. *[5:95]**5:96*-18.

(c) A municipality that has also appointed a municipal housing liaison pursuant to N.J.A.C. *[5:95]**5:96*-17, shall contract with an administrative agent pursuant to N.J.A.C. *[5:95]**5:96*-18 for all applicable tasks not performed by the RCA administrator or municipal housing liaison.

*[5:95]**5:96*-19.3 Approval of the RCA administrator

(a) The appointment of the RCA administrator is subject to review and approval by the Council's Executive Director.

(b) Upon submission of an RCA Project Plan to the Council, the receiving municipality shall submit its ordinance establishing the position of the RCA administrator and a resolution by the governing body or a letter from the chief executive appointing a municipal employee to serve as the RCA administrator.

(c) If the RCA administrator is to perform the duties of an administrative agent, the municipality shall also submit evidence of the RCA administrator's history of successful management of affordable housing units, particularly those produced as a result of the New Jersey Fair Housing Act or through a *Mount Laurel* court settlement, which shall include:

1. A resume;

2. A statement of qualifications; and

3. A statement of intent to attend continuing education opportunities related to the creation, preservation and administration of affordable housing programs and/or affordable units provided by the Council.

(d) The Council shall monitor the performance of the approved RCA administrator. In the event the RCA administrator does not administer the municipality's affordable housing program and/or affordable units in accordance with the Council's rules, the Council may revoke its approval.

*[5:95]**5:96*-19.4 Education requirements

(a) In order to receive approval, all appointed RCA administrators shall successfully complete the Council's Education Program for RCA Administrators as described in N.J.A.C. *[5:95]**5:96*-20 in the timeframes set forth below:

1. Any municipal employee already serving as RCA administrator as of *[(effective date of this chapter)]* ***June 2, 2008*** shall be required to successfully complete the Education Program for RCA Administrators by the later of *[(six months from the effective date of this chapter)]* ***December 2, 2008***, or the date of the next Education Program for RCA Administrators.

2. Any municipal employee appointed to serve as RCA administrator subsequent to *[(effective date of this chapter)]* ***June 2, 2008*** shall be required to successfully complete the Education Program for RCA Administrators by the later of six months from the date of appointment, or the date of the next Education Program for RCA Administrators.

(b) If the RCA administrator is to perform the duties of *[an]* the administrative agent, in order to receive approval, the RCA administrator shall also successfully complete the Council's Education Program for Administrative Agents as described in N.J.A.C. *[5:95]**5:96*-20 in the time frames set forth below:

1. Any municipal employee already serving as RCA administrator as of *[(effective date of this chapter)]* ***June 2, 2008*** shall be required to successfully complete the Education Program for Administrative Agents by the later of *[(one year from the effective date of this chapter)]* ***June 2, 2009***, or one year after the date of the first Education Program for Administrative Agents.

2. Any municipal employee appointed to serve as RCA administrator subsequent to *[(effective date of this chapter)]* ***June 2, 2008*** shall be required to successfully complete the Education Program for Administrative Agents by the later of one year from the date of appointment, or the date of the next Education Program for Administrative Agents.

(c) Approved RCA administrators shall also attend continuing education opportunities related to the creation, preservation and administration of affordable housing programs and/or affordable units provided by the Council.

SUBCHAPTER 20. EDUCATION PROGRAM

*[5:95]**5:96*-20.1 Purpose

The purpose of the Education Program is to provide a basic understanding of the roles and duties of any person or entity appointed or contracted with to serve as a municipal housing liaison pursuant to N.J.A.C. *[5:95]**5:96*-17, an administrative agent pursuant to N.J.A.C. *[5:95]**5:96*-18, and/or an RCA administrator pursuant to N.J.A.C. *[5:95]**5:96*-19.

*[5:95]**5:96*-20.2 Cost and tuition

(a) The Council's Executive Director shall determine and approve the delivery of the Education Program. The providers may charge a reasonable tuition to cover the cost of offering the Education Program, not in excess of the expense of administration and delivery of the Education Program or parts thereof.

(b) Subject to the availability of funds, the Council shall provide tuition for municipal employees appointed to serve as the municipal housing liaison, administrative agent, and/or RCA administrator attending any session required by the Council pursuant to N.J.A.C. *[5:95]**5:96*-17.4, 18.3 and 19.4. Such funding shall be limited to one municipal employee per year.

*[5:95]**5:96*-20.3 Curriculum and requirements

40 N.J.R. 3161(a)

(a) The Education Program may include one or more sessions.

(b) The initial session is a pre-requisite for all other sessions and is required to be taken by municipal housing liaisons, RCA administrators and administrative agents. The initial session shall, at a minimum, provide an overview of the roles and responsibilities of municipal housing liaisons, RCA administrators and administrative agents.

(c) Additional sessions shall provide detailed instruction for the administration of affordable housing programs and affordable units, including but not limited to: affirmatively marketing affordable units, determining affordable sales prices and rents, establishing and managing an applicant pool, matching households to available units, certifying households, implementing affordability controls, preparing legal documents, and ethics.

*[5:95]**5:96*-20.4 Standards for determining satisfactory completion

(a) At the conclusion of each session, all attendees shall take a multiple-choice test. Session participants will be permitted to use the session materials and notes for reference while completing the test.

(b) In order to receive a certificate of completion, attendees shall demonstrate an adequate understanding of the Education Program material by achieving at least a 70 percent score on the test. The tests shall be graded by the session providers.

(c) Attendees who do not achieve at least a 70 percent score on the test may re-take the test once without re-taking the session. Attendees who do not achieve at least a 70 percent score on the second test shall be required to re-take the session and the test.